No. 20-16375

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenor-Plaintiff-Appellee,
KQED, INC.,
Intervenor-Appellee,
v.
GAVIN NEWSOM, in his official capacity as Governor of California, et al.,
Defendants,
and
DENNIS HOLLINGSWORTH, et al.,
Intervenors-Defendants-Appellants.

Appeal From United States District Court For The Northern District Of California
Case No. 3:09-cv-02292-JW (WHO) (Honorable William H. Orrick)

OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

Other Authorities

Rules

INTRODUCTION

More than a decade ago, the Northern District of California conducted a historic civil rights trial on an issue of great public interest and importance—whether California's Proposition 8, which stripped gay and lesbian Californians of the right to marry, violated the United States Constitution. The trial showcased each side's best arguments and evidence for and against marriage equality, laying bare the prejudice and misconceptions that had, for nearly all of American history, relegated gays and lesbians to a status of second-class citizens.

The entire trial was videotaped to aid the court in its review of the full record in reaching its decision. Relying on that recording and the arguments of the parties, the district court ultimately found Proposition 8 unconstitutional and directed the clerk to file the video recording under seal as part of the record without objection from any party. Under the Northern District of California's Local Rule 79-5(g), any document or thing filed under seal in a civil case shall, upon request, be open to the public after ten years, absent a showing justifying continued sealing. The official proponents of Proposition 8 ("Proponents") have conceded to this Court that they fully understood the ten-year presumptive duration of the seal and that it would be incumbent on them to show good cause to continue to seal the video beyond the ten-year mark. While Proponents have now asked the district court to maintain the seal permanently, they offer no reason whatsoever, let alone a compelling one, to

disregard the Local Rule or overcome the presumption of public access under the common law and First Amendment. The district court, upon careful consideration, correctly rejected Proponents' request that the seal be made permanent and ordered that the recordings be unsealed on August 12, 2020, ten years after judgment issued and the case was ordered closed.

Proponents now move this Court to stay the order unsealing the recordings, thus further delaying the public's access to a historically significant public record. But Proponents fail to carry the heavy burden of demonstrating that a stay is warranted because they cannot make a strong showing that they are likely to succeed on the merits, nor can they demonstrate irreparable harm.

Proponents have failed to show a likelihood of success on the merits. Local Rule 79-5(g) presumptively requires unsealing after ten years. This Court *explicitly* recognized that fact in its 2012 decision holding that the trial recordings should not be released shortly after sealing, and it interpreted Chief Judge Walker's assurance that that the recording would not be made public, "at least in the foreseeable future," as a promise cabined by the time requirements of the Local Rule. *See Perry v. Brown*, 667 F.3d 1078, 1084–85 & n.5 (9th Cir. 2012). Furthermore, as noted above, Proponents themselves conceded at oral argument before this Court that they knew of the applicable local rule and did not believe that the sealing of the recording would necessarily be permanent. While Proponents now try to rewrite history as to what

they understood and expected, their protests ring hollow. It is obvious in this context that Chief Judge Walker abided by his commitment not to "broadcast" the trial and that the unsealing of the recording is governed by Local Rule 79-5 as is any other document or thing placed under seal in a civil case. In short, release of the recordings now would not do any harm to "judicial integrity." The common law's and First Amendment's strong presumption in favor of public access further confirms the correctness of Judge Orrick's order to unseal the recordings. This is particularly so because despite being put on notice in 2018 by Judge Orrick that their "judicial integrity" argument would be insufficient to justify permanent sealing, Proponents have failed to set forth any other reason to maintain the seal.

Nor can Proponents demonstrate irreparable harm absent a stay. First, to the extent that Proponents try to cast "mootness" as an irreparable harm, they are mistaken. Mootness in and of itself—absent any actual harm *to the applicant* that will come from the underlying order becoming effective—does not warrant a stay. The *only* other harm Proponents even attempt to allege is harm to "judicial integrity" because Judge Walker told Proponents that the recording would be placed under seal. But that is not a harm faced *by the Proponents*, and in any event, as will be described below, the interest in judicial integrity does not favor sealing the recording beyond the ten years provided under the Local Rules.

Proponents have failed to demonstrate that they are entitled to a stay, and their motion should be denied.

BACKGROUND

I. The Proposition 8 Trial

In 2009, two couples who wanted to marry, along with the City and County of San Francisco, challenged the constitutionality of Proposition 8, which prohibited same-sex couples from marrying. When the government declined to defend Proposition 8, the official Proponents of Proposition 8 intervened to defend the law. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

Judge Walker held a public bench trial in 2010, which lasted 13 days (approximately 77 hours) and included testimony from 19 witnesses, 16 of whom testified in support of Plaintiffs. The trial garnered immense public interest, and the testimony was emotional and powerful. As Plaintiff Kristin Perry described it later: "I willed myself to speak very personally about my hope to one day marry the woman I love, which I hoped would also highlight the universal themes of love and equality." RA, Exh. 3, at pp. 98–99 ¶ 4. "I think this generation of politicians, community leaders, and lawmakers should see the tapes, so they can see the pain and suffering they inflict when unjust laws are put on the books." *Id.* ¶ 6.

In August 2010, Judge Walker found Proposition 8 to be unconstitutional. *Perry*, 704 F. Supp. 2d at 927. On appeal, this Court affirmed. *Perry v. Brown*, 671

F.3d 1052 (9th Cir. 2012). The Supreme Court then held that Proponents lacked standing to appeal, vacated this Court's decision, and ordered it to dismiss the appeal. *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). Judge Walker's decision finding Proposition 8 unconstitutional ultimately remained in place, and same-sex couples across California were able to marry.

II. Chief Judge Walker Records The Trial, Considers It When Reaching His Decision, And Places The Video Recording Into The Record Under Seal

Before trial commenced, Judge Walker ordered it to be broadcast to several courthouses under an amendment to Local Rule 77-3 that permitted certain broadcasting under a pilot program. *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010) ("*Hollingsworth I*").

On the first day of trial, the Supreme Court temporarily stayed the broadcast while it considered a stay motion by Proponents. *Hollingsworth v. Perry*, 558 U.S. 1107 (2010) (*"Hollingsworth II*"). Two days later, the Court extended its stay, holding that Judge Walker's "amendment" of local rules to permit broadcast likely violated federal law. *Hollingsworth I*, 558 U.S. at 189, 199. When the stay became permanent, Proponents asked Judge Walker to stop recording. Judge Walker responded:

> The local rule permits the recording for purposes . . . of use in chambers. . . . And I think it would be quite helpful to me in preparing the findings of fact to have that recording. So that's the purpose for

> which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.

Perry v. Brown, 667 F.3d 1078, 1082 (9th Cir. 2012). Proponents then "dropped their objection." *Id.*

In his order finding Proposition 8 unconstitutional, Judge Walker explained that he used the recording "in preparing the findings of fact and conclusions of law," and he directed that the clerk "file the trial recording under seal as part of the record." *Perry*, 704 F. Supp. 2d at 929. Judge Walker permitted the parties to retain copies of the recording under a protective order. *Id.* at 929. On appeal, Proponents did not challenge the district court's entry of the recording in the record. *Perry*, 667 F.3d at 1083.

III. Initial Motions Regarding Sealing

While Proponents' appeal was pending, they moved to compel all parties to return their copies of the recording. Plaintiffs—joined by media organizations including KQED—cross-moved to unseal the recording. In 2011, Chief Judge Ware granted Plaintiffs' motion. *Perry v. Schwarzenegger*, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011).

Proponents appealed. During oral argument, Judge Hawkins asked Proponents' counsel whether his clients were "under the impression that these tapes would be forever sealed." Proponents' counsel responded:

> No, your Honor, I believe that a seal lasts for—not necessarily, I guess, is the better answer. A seal lasts for ten years under the local rules of the Northern District of California, and at the end of the . . . case, then we would be entitled to go in and ask for an extension of that time, to a specific date, but it would be a minimum of ten years . . . .

Proponents' counsel further noted that they were "aware of the local rules."[1]

In its decision reversing Judge Ware's order, this Court considered "whether, given the unique circumstances surrounding the creation and sealing of the recording of the trial in this case, the public is entitled to view that recording some two years after the trial." *Perry*, 667 F.3d at 1080. This Court assumed "that the common-law presumption of public access applies" and "that it is not abrogated" by Local Rule 79-5. *Id.* at 1084. Nevertheless, it held that the "compelling reason" of "Chief Judge Walker's special assurances . . . that the recording would not be broadcast to the public, at least in the foreseeable future" overcame the common-law presumption. *Id.* at 1084–85. After noting that Chief Judge Walker's assurance was limited to the "foreseeable future," this Court cited Local Rule 79-5 and its ten-year duration. *Id.* at 1085 n.5.

IV. Present Sealing Motions

In 2017, KQED again moved to unseal the recording. RA, Exh. 1, at p. 1. In ruling on this request, Judge Orrick found that, unless Proponents could demonstrate

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[1] Oral Argument at 7:04–7:48, *Perry v. Brown*, 667 F.3d 1078, 1082 (9th Cir. 2012) (No. 11-17255), https://bit.ly/35toPvJ ("*Perry* oral argument").

a compelling reason to maintain the seal, the Court would lift the seal ten years after the case's closure as required under Local Rule 79-5. *Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047, 1058 (N.D. Cal. 2018), *appeal dismissed*, 765 F. App'x 335 (9th Cir. 2019) (AA, Exh. 2, at p. 6). Judge Orrick directed Proponents to file a motion to continue the seal by April 1, 2020 if they wanted to maintain the seal on the trial recording beyond August 20, 2020. *Id.*

On April 1, 2020, Proponents filed their motion to continue the seal permanently. RA, Exh. 2, at 31. Proponents urged the district court to reverse its earlier findings that Local Rule 79-5 presumptively requires unsealing after ten years and that the common-law right of access and First Amendment also apply and require unsealing, absent compelling reasons to the contrary. Proponents submitted no evidence that they or their witnesses would suffer *any* harm from unsealing. By contrast, 15 of Plaintiffs' witnesses submitted declarations supporting unsealing. *See* RA, Exh. 3, at pp. 97–168.

The district court denied Proponents' motion. AA, Exh. 1, at p. 1. It found that Proponents relied "solely" on their "judicial integrity" argument, but presented no "evidence that any Proponent or trial witness on behalf of the Proponents believed at the time or believes now that Judge Walker's commitment to personal use of the recordings meant that the trial recordings would remain under seal forever." *Id.* The district court further relied on "the guidance in *Perry v. Brown*, . . . the prior Ninth

Circuit opinion on the subject," to "conclude[] that Northern District Civil Rule 79-5(g) and its ten year default for sealing court records set the reasonable limit for sealing the trial recordings." *Id.* at p. 2.

The court acknowledged the "attorney argument" regarding reliance on Judge Walker's statements, but it found Proponents' counsel's "concessions" regarding Proponents' understanding of the Local Rules to be "a significant indication that even Proponents' counsel contemporaneously understood that sealing is typically limited in time." *Id.* at pp. 3–4. It thus found "absolutely no[]" justification "presented on this record" to overcome the common-law presumption of unsealing. *Id.* at p. 4. Because "there is no justification, much less a compelling one, to keep the trial recordings under seal any longer," they "shall become public on August 12, 2020." *Id.* The court declined to stay its order because Proponents had two years since the last order to raise any additional concerns about the seal. *Id.* at 5.

ARGUMENT

I. This Court Should Deny The Stay

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Instead, it is an "exercise of judicial discretion" that depends "upon the circumstances of the particular case." *Id.* A stay is appropriate only when: (1) the applicant makes "a strong showing" of likelihood of success on the merits; (2) the applicant will be "irreparably harmed

absent a stay"; (3) a stay will not "substantially injure other parties"; and (4) "the public interest" favors a stay. *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020) (quoting *Nken*, 556 U.S. at 434). The Court considers the last two factors only "if the first two factors are satisfied," *id.*, and weighs them on a "sliding scale," such that "a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011).

A. Proponents Are Unlikely To Succeed On The Merits

Judge Orrick's concise and well-reasoned decision is fully consistent with the evidence (or lack thereof) before him, and also with the law. Proponents make no showing—let alone a "strong" one—that they are likely to succeed in their challenge of Judge Orrick's decision to unseal this recording of a public trial upon expiration of the ten-year sealing period provided by the Local Rules. Specifically, Proponents are unlikely to succeed on the merits because they do not provide a compelling reason sufficient to: (i) rebut Local Rule 79-5's presumption of unsealing after ten years; or (ii) overcome the public right of access under the common law and First Amendment.

1. Local Rule 79-5 Presumptively Requires Unsealing After Ten Years And Proponents Have Offered No Sufficient Reason To Maintain The Seal

Proponents argue that Local Rule 79-5 does not apply, and that even if applicable, they have shown a compelling reason to maintain the seal. Proponents

are wrong on both counts. First, under the Northern District's local rules, "[a]ny document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed," unless otherwise ordered upon a showing of good cause. N.D. Cal. Local Rule 79-5(g).[2] This rule is straightforward and obviously applicable here as this Court itself previously observed. *Perry*, 667 F.3d at 1084–85 & n.5 (citing Local Rule 79-5[3] in cabining holding to denial of release of tapes to at least the foreseeable future); *see Folex Golf Indus., Inc. v. O-TA Precision Indus. Co.*, 700 F. App'x 738, 738 (9th Cir. 2017) ("Under the 'law of the case' doctrine, a district court is 'precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case . . . .'" (quoting *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997))).

At the time of the trial and when the recording of the trial was placed in the record, Proponents also were aware of Local Rule 79-5 and understood that the sealing was not permanent. Proponents' counsel conceded this during oral argument

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[2] While the text of the Local Rule refers to "any document," the commentary to other subdivisions of the Local Rule clarifies that "document" is an all-encompassing term that includes "documents or things." Commentary, N.D. Cal. Local Rule 79-5(a)-(b).

[3] The then-applicable automatic unsealing provision was found in Local Rule 79-5(f), but subdivision (f) is substantively the same as the current subdivision (g). *See* AA 13.

before this Court in 2011. *Perry* oral argument at 7:04–7:48. Proponents' about-face and current contention that Local Rule 79-5 does not apply and that they were promised the recordings would be forever sealed is unpersuasive. *See* RA, Exh. 2, at 50. Their counsel's concession in oral argument, in response to a direct question from one of the members of the panel going to the very nature of the "assurance" at issue, was no mere "slip of the tongue" or "aside" and is therefore a binding judicial admission. *In re Adamson Apparel, Inc.*, 785 F.3d 1285, 1294 (9th Cir. 2015); *see Amberhill Props. v. City of Berkeley*, 814 F.2d 1340, 1341 (9th Cir. 1987).

Even if not a binding judicial admission, these "concessions" are at a minimum, as the district court explained, "a significant indication that even Proponents' counsel *contemporaneously* understood that sealing is typically limited in time." AA, Exh. 1, at p. 4 (emphasis added). These concessions directly undermine Proponents' sole argument for maintaining the tapes under seal—that they *relied upon* Judge Walker's representation that the tapes would remain under seal *permanently* and that judicial integrity would be undermined by their release. Proponents cannot expect this Court to accept this current argument, as it finds no support in the record and directly contradicts their earlier arguments. Proponents also miss the point when they argue that the interest in judicial integrity is not limited to ten years. The point is that there is no judicial integrity interest in sealing this

video beyond the ten-year period provided in the Local Rule of which they were admittedly aware.

In a final effort to evade the straightforward application of Local Rule 79-5, Proponents try to manufacture a conflict between Local Rule 77-3 and Local Rule 79-5. *See* Mtn. at 13–15. But, Local Rule 77-3, which prohibits the recording of court proceedings for broadcast, is inapplicable here. The *only* Local Rule that addresses unsealing a portion of the record is Local Rule 79-5(g), and, as the district court correctly found, "[n]othing in the Rules themselves creates an inherent conflict." *Perry*, 302 F. Supp. 3d at 1058; *see Qualls ex rel. Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 842 n.2 (9th Cir. 1994) (district courts "have broad discretion to interpret" local rules); *United States v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979) (district court's discretionary application of local rules "rare[ly]" questioned).

The issue here is whether to *unseal* the video, not whether to broadcast it, which the district court never did. Once unsealed, the public can access the video and use it for any lawful purpose. While *the public* may choose to publish some or all of the recordings, for example as part of a documentary, they could do the same with any other sealed material, such as written documents or photographs. The public also can use the records for personal review, scholarly research, or a visual aid in teaching about civil rights cases. *See, e.g.*, RA, Exh. 3, p. 137 ¶ 7 ("The fullest possible historical record of the trial will prove invaluable to those who come after

us, especially when firsthand recollections are no longer available."); RA, Exh. 3, p. 163 ¶ 7 ("[B]oth historians and social scientists would benefit from seeing the witnesses' demeanor and reactions rather than reading from a transcript."); RA, Exh. 3, p. 141 ¶ 7 ("It is my opinion that the trial recordings are of great historical value, and that they would be an invaluable teaching tool for students studying the issues of gay rights and marriage equality."). Local Rule 77-3 says nothing about those lawful uses.

2. The Right Of Public Access Requires Unsealing

Even if Local Rule 79-5 somehow did not apply, Proponents could still not show a likelihood of success on the merits because they cannot demonstrate a compelling reason to continue to deny public access to these important records. Federal common law recognizes a "general right to inspect and copy . . . judicial records and documents." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597 (1978) (footnotes omitted). The First Amendment right of access is even "stronger" than the common-law right of access. *United States v. Carpenter*, 923 F.3d 1172, 1179 (9th Cir. 2019).

The common-law right of access applies here. Although the presumption does not attach to certain categories of documents that "have traditionally been kept secret for important public policy reasons," *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989), this Court repeatedly has held that these categories are

few and "narrow," *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *Carpenter*, 923 F.3d at 1178–79 (refusing to expand categories of documents immune from presumptive access). Proponents' arguments that the common-law presumption is inapplicable are meritless. First, they argue that the video recording here is "akin to private documents not traditionally exposed to the public," RA, Exh. 2, at 46, but there is nothing private about *public* trial testimony. Second, they argue that Local Rule 77-3 displaces the common-law right to public access. Mtn. at 13. Local Rule 77-3, however, does not speak to the unique situation here. It says nothing about sealing (or unsealing) records; and Judge Walker did not record the trial *for the purpose* of public broadcast. Third, Proponents try to evade the common-law right of public access by asserting that the recordings are "derivative in nature," Mtn. at 15–16, invoking the Eighth Circuit's decision in *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996), which held that the video recording of President Clinton's deposition testimony was not a "judicial record" to which the common-law presumption of public access attaches. But this case does not involve deposition testimony. And, in any event, this Circuit takes a different approach. *See Kamakana*, 447 F.3d at 1184; *Perry*, 302 F. Supp. 3d at 1056.

The district court also correctly determined that the First Amendment right of public access compels the same result. AA, Exh. 2, at p. 19. The First Amendment right "flows from an 'unbroken, uncontradicted history' rooted in the common law

notion that 'justice must satisfy the appearance of justice.'" *Courthouse News Serv. v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573–74 (1980)).

Because the right of public access applies, Proponents bear the burden of showing a likelihood of success on the merits by showing a "compelling reason" for maintaining the seal. As discussed above, they cannot. The district court correctly found that Proponents failed to submit *any* evidence that they believe Judge Walker's statement to require indefinite sealing (indeed, in 2011, their counsel stated the opposite) or that they would be harmed by unsealing. AA, Exh. 1, at p. 3. Moreover, a finding that the First Amendment applies to these unique circumstances would not "imply that the longstanding bar on the public broadcast of trial proceedings is unconstitutional." RA, Exh. 2, at 53. Unsealing the recording is not a public broadcast by the Court. It is providing the public access to material—entered into the record without objection—that aided Judge Walker in rendering his decision.[4]

[4] Plaintiffs alternatively asked the district court to narrowly tailor any continued sealing to comply with the rule that requests to seal material in civil cases be "narrowly tailored to seek sealing only of sealable material." Local Rule 79-5(b). RA, Exh. 3, at 82. Plaintiffs will request the same alternative relief here if this Court reverses any portion of the district court's order.

B. Proponents Cannot Show Irreparable Injury

Proponents do not argue that the public's ability to view the recording would harm them. AA, Exh. 1, at p. 3. That should end the irreparable harm inquiry, which "focus[es] on the *individualized* nature of irreparable harm and not whether it is 'categorically irreparable.'" *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (citation omitted; emphasis added). Rather than identify any specific harm they would face from the release of the trial recordings, Proponents claim that they will be irreparably harmed absent a stay because (1) their appeal will become moot and (2) the integrity of the judicial system will be irreparably harmed. Mtn. at 19–20. Neither argument warrants granting a stay.

Proponents assert that "[t]he threat of certain mootness is by definition irreparable injury." Mtn. at 19. Not so. Mootness *in itself* is insufficient to constitute irreparable harm. Indeed, in *Hollingsworth v. Perry*, the Supreme Court recognized that the live broadcast of the Proposition 8 trial could result in irreparable harm, but not simply because any appeal would become "moot." 558 U.S. 183, 195 (2010). Rather, the Court "recognized that witness testimony may be chilled if broadcast," and that "[s]ome of applicants' witnesses [had] already said that they [would] not testify if the trial [was] broadcast." *Id.* Thus, there was the asserted possibility of a real and concrete harm *to the applicants* in the absence of a stay—beyond simply the mootness of their appeal. No such harm has been identified here.

Proponents also cite *Artukovic v. Rison*, in which this Court recognized the possibility of irreparable injury to the plaintiff if his motion to stay his extradition from the country was denied, because "his appeal [would] become moot and [would] be dismissed since the extradition will have been carried out." 784 F.2d 1354, 1356 (9th Cir. 1986). But the irreparable harm in *Artukovic* was the applicant's *extradition*—not the mootness of the appeal itself. Moreover, the Court in *Artukovic* denied the stay. *Id.* Proponent's citation to *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942), in which the Supreme Court simply recognized the *power* of the D.C. Circuit to stay enforcement of a Federal Communications Commission order, is inapposite because *Scripps-Howard* says nothing about mootness constituting irreparable injury in itself.

And while Proponents may be correct that "[a]ll parties have an interest in having their disputes 'decided on the merits, as correctly and expeditiously as possible,'" Mtn. at 19 (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)), that *general* interest has nothing to do with mootness. If it did, that would mean an applicant would show irreparable harm sufficient to warrant a stay in *any* case in which they seek a decision on the merits before an order becomes effective, regardless of whether any actual harm to them will result from that order.

Proponent's second argument fares no better. Proponents claim that "[p]ublic broadcast of the trial threatens grave and lasting 'damage to the integrity of the judicial process.'" Mtn. at 20 (quoting *Perry*, 667 F.3d at 1087). They suggest in broad strokes that public confidence in the courts will be harmed by unsealing. *Id.* As discussed above, there is no harm to judicial integrity as a result of unsealing at the ten-year mark pursuant to Local Rule 79-5, which Proponents always understood applied. But even if Proponents' argument about some public harm to judicial confidence had merit (which it does not), Proponents say nothing about how any of them—individually—would be harmed in any way. Their suggestion that the general public would be injured absent a stay due to "judicial integrity" ignores the necessary "individualized consideration[s]," *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011), and precludes a finding of irreparable harm.

C. The Remaining Equitable Factors Also Disfavor A Stay

Proponents' failure to satisfy the first two factors means that the stay could be denied without even examining the other two equitable factors—whether a stay would prejudice plaintiffs and the public and whether a stay would be in the public interest. *Trump*, 957 F.3d at 1058; *Li v. A Perfect Franchise, Inc.*, 2011 WL 2293221, at *5 (N.D. Cal. June 8, 2011). When analyzed, however, these factors also disfavor a stay.

A stay would prejudice Plaintiffs and not be in the public interest. Judgment in this case was entered a decade ago—in August 2010.[5] Since then, Plaintiffs and KQED have diligently sought the release of the trial recordings and opposed Proponents' efforts to maintain the seal. *See Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012); AA, Exh. 2, App. 6–20. Despite this complete lack of potential harm to them, Proponents seek yet another appeal—which can take more than a year[6]—in their quest for an *indefinite* seal. There is no need for yet more years of delay after the decade Plaintiffs and the public have already waited. This is especially so given that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012). And, of course, Courts should avoid unnecessary delay in resolving the rights of litigants. *See generally Kahn v. Gen. Motors Corp.*, 889 F.2d 1078, 1080 (Fed. Cir. 1989) ("It is the duty of courts to avoid unnecessary delay in resolving the rights of litigants.").

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[5] In 2012, the district court directed that judgment be entered "*nunc pro tunc* to August 12, 2010, the date on which the Court directed that judgment be entered 'forthwith.'" AA, Exh. 15, at p. 145.

[6] *See* Ninth Circuit Office of the Clerk Frequently Asked Questions (Dec. 2019), https://bit.ly/3dGNn6H ("For a civil appeal, [oral argument is] approximately 12-20 months from the notice of appeal date" and that *after* oral argument "most cases are decided within 3 months to a year.").

With each passing day that the recordings are not released, the public's opportunities to share and learn from this significant historical record are lost. Certainly, there are students who will forgo learning this piece of history from the best record available; and, of course, there will be those members of the public who will pass away before this recording is released.

II. If The Court Grants A Stay, It Should Expedite This Appeal

Alternatively, if the Court grants Proponents' motion, Plaintiffs respectfully request that this appeal be expedited so that, if Plaintiffs ultimately prevail, the public can access the video recording without undue delay. A typical civil appeal in this Circuit can take more than a year. The governing Local Rule, common law, and First Amendment require unsealing no later than ten years after case closure. That date is imminent, and Proponents should not be permitted to deny the public their right to view the recording any longer. An expedited appeal would ensure that members of the public who want to view the recording—and the Plaintiffs and witnesses who want to share it with them—are finally able to have their own virtual seats in the courtroom.

CONCLUSION

Proponents' motion for a stay should be denied. If the Court grants a stay, it should expedite this appeal.

Respectfully submitted,

/s/ *Theodore B. Olson*

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ADDENDUM

N.D. Cal. Local Rule 77-3

Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term "environs," as used in this rule, means all floors on which chambers, courtrooms or on which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings.

N.D. Cal. Local Rule 79-5(g)

Effect of Seal. Unless otherwise ordered by the Court, any document filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. Any document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed. However, a Submitting Party or a Designating Party may, upon showing good cause at the conclusion of a case, seek an order to extend the sealing to a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records disposition policy of the United States Courts.

STATEMENT OF RELATED CASES

Counsel for Plaintiffs-Appellees are aware of no cases pending in this court that are related to this appeal within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition complies with the typeface requirements in Ninth Circuit Rule 27(d)(1)(E) because it uses proportionally spaced Times New Roman 14-point font. I further certify that this opposition complies with the word limitation in Ninth Circuit Rule 27(d)(2) because it contains 5,188 words.

Dated: July 27, 2020

/s/ *Theodore B. Olson*
Theodore B. Olson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 27, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 27, 2020

/s/ *Theodore B. Olson*
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No. 20-16375

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTIN M. PERRY, et al.,
Plaintiffs-Appellees,
CITY AND COUNTY OF SAN FRANCISCO,
Intervenor-Plaintiff-Appellee,
KQED, INC.,
Intervenor-Appellee,
v.
GAVIN NEWSOM, in his official capacity as Governor of California, et al.,
Defendants,
and
DENNIS HOLLINGSWORTH, et al.,
Intervenors-Defendants-Appellants.

Appeal From United States District Court For The Northern District Of California
Case No. 3:09-cv-02292-JW (WHO) (Honorable William H. Orrick)

RESPONDENT'S APPENDIX OF EXHIBITS IN SUPPORT OF OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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TABLE OF CONTENTS

EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

Kristin M. Perry, et al.,

Plaintiffs,

v.

Edmund G. "Jerry" Brown, Jr., Governor of California,

Defendant.

Case No. 09-cv-2292

MOTION TO UNSEAL VIDEOTAPED TRIAL RECORDS

Date:
Time:
Department:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Constitutional Provisions

Other Authorities

PRELIMINARY STATEMENT

Over seven years ago, the Northern District of California hosted one of the most extraordinary federal trials in the nation's history: For two-and-half weeks in January of 2010, this Court conducted a bench trial and heard evidence and argument regarding the constitutionality of California's then-recent Proposition 8, which added a provision to the State Constitution providing that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5. Ultimately, after months of careful post-trial consideration, the court ruled in favor of the same-sex couples challenging the Proposition and held that Prop 8 was unconstitutional because the U.S. Constitution "protects an individual's choice of marital partner regardless of gender." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010). The U.S. Supreme Court affirmed the Court's ruling in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (*Hollingsworth II*). Five years later, the U.S. Supreme Court recognized the constitutional right of same-sex couples to marry nationwide. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

Happily for court-watchers, law students, scholars, historians, activists, concerned citizens, and those interested in the transparent operation of the judicial branch, the entire historic trial was videotaped. But, in a strange irony, those videotapes have never been seen by members of the general public. A Ninth Circuit decision in 2012 ordered the tapes to remain sealed at that time, so, while much information about the trial is known to the public, the videotaped record languishes indefinitely under seal in the court file. *See Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012).

Intervenor KQED, Inc. operates the nation's most-listened-to public radio station and the Bay Area's most popular public television station, and it now moves the Court to unseal the tapes and permit them to be viewed by everyone.[1] Unsealing is appropriate because so much has changed since the Ninth Circuit ordered that the tapes remain sealed over five years ago. At that

[1] KQED is a member of a Media Coalition that earlier intervened in this case. *See* ECF No. 670; *see also* Intervenor Non-Party Media Coalition's Principal Brief On Appeal in Ninth Circuit Case No. 11-17255 (filed Nov. 13, 2011, and available at 2011 WL 6077437).

time, the appeal of the merits was still pending. But since then, the appeal of the district court's ruling that Prop 8 was unconstitutional was dismissed, *see Hollingsworth II*, 133 S. Ct. at 2659, and the U.S. Supreme Court put this issue to rest once and for all, *see Obergefell*, 135 S. Ct. at 2608. In other words, the legal issue at the core of the case has now moved from the category of hotly-litigated controversies to settled law.

The First Amendment calculus regarding sealing of records has also changed since 2012. The Ninth Circuit has recently held that the First Amendment protects the public's right of access to records of civil proceedings because "access to public proceedings and records is an indispensable predicate to free expression about the workings of government." *Courthouse News Service v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014). Parties must have a "compelling reason" for courts to seal records—even when both parties actively request the sealing. *Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014). These were open issues in 2012, but they have now been settled in favor of access.

Moreover, the public discussion of gay rights has shifted substantially since the Prop 8 trial. One of two witnesses who testified at the trial for the defense in favor of upholding Prop 8 has very publicly switched his position and now supports same-sex marriage. At least 60% of Americans now support same-sex marriage, as opposed to 44% just seven years ago, around the time of the trial. And, while there continues to be state legislation introduced to limit the rights of same-sex couples, *see* Decl. of Kate Kendell at ¶ 4, video of the only federal court trial in which two weeks of argument and evidence concerning all aspects of the lives of same-sex marriage remains sealed and off-limits to the public.

The sealing of the video of the Prop 8 trial proceedings can no longer be justified by any compelling interest. Rather, the interests to the public in unsealing the videotapes now far outweigh the privacy or other interests of judicial administration. While the public interest in seeing the open work of government remains compelling, any privacy interests of those involved in the trial have disappeared almost entirely, because the trial is no longer ongoing and the appeal has been decided.

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Moreover, unsealing the records now would not undermine the trial court judge's specific assurances to the proponents of Proposition 8 seven years ago that the videotapes would not be broadcast for the "foreseeable future." *Perry v. Brown*, 667 F.3d 1078, 1084-85 (9th Cir. 2012). To the contrary: any meaningful threat of harm from "public broadcast" has now fully dissipated, and no one who participated in the trial could have relied on a promise that the videotape would be sealed indefinitely. The combination of the operative court rules, the Ninth Circuit's prior opinion indicating that there would be a time when unsealing would be permissible, and the virtual impossibility of being able to justify the sealing the indefinite sealing of a public record means that the question is not *if* the videotapes should be unsealed, but *when*—and *right now* is the appropriate time.

BACKGROUND

A. The "Prop 8" Trial

1. The Constitutional Challenge To Prop 8 Begins.

In 2008, California voters passed "Proposition 8," the ballot initiative at the center of this dispute. "Prop 8," as it was frequently called, amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5.

The Plaintiffs in this litigation are gay and lesbian Californians who were in committed, long-term relationships at the time the law was enacted. They wished to marry but could not because of Proposition 8. *E.g.* Decl. of Paul Katami at ¶ 2 ("I wasn't being treated equally because I couldn't marry the person I love."). The Plaintiffs sued to challenge the constitutionality of Prop 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Governor and Attorney General of the State refused to defend the constitutionality of Prop 8, but this Court permitted the Proponents of the ballot proposition to intervene to defend its constitutionality.

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2. The Historic Bench Trial Is Recorded, And The Recording Is Placed In The Record, Under Seal.

Then-Chief Judge Vaughn Walker was assigned the case. As trial approached, Chief Judge Walker expressed his interest in broadcasting the proceedings. Initially, he wished to allow simultaneous broadcast to the public, but, in a 5-4 ruling issued at the start of the trial, the U.S. Supreme Court ruled that the recording and broadcast of the trial was not permitted by the Local Rules in effect at the time of trial. *Hollingsworth v. Perry*, 558 U.S. 183, 199 (2010) (per curiam) (*Hollingsworth I*).

Nonetheless, as the trial court and the parties recognized, the court was still permitted to videotape the trial, even if it could not be simultaneously broadcast. Instead, as the court found, "the local rule permits the recording for purposes . . . of use in chambers." *Perry*, 667 F.3d at 1082. No party objected to the continued recording of the trial, given that the trial would not be simultaneously broadcast. *Id.*

All four of the Plaintiffs testified. They believe that the emotional impact of their live, in-person testimony was a critical part of their case that has so far not been able to enter the public discussion. Plaintiff Paul Katami notes that those in the courtroom who watched him testify could "judge for themselves [his] commitment" to his now-husband Jeff and "hear the way [his] voice quivers when [he] talk[s] about what Jeff means to [him]." Katami Decl. at ¶ 6. Likewise, Plaintiff Kristin Perry believes that those who saw her testify could "see how terrified [she] was" and "how personal this was for her." Decl. of Kristin Perry at ¶ 7. Those watching, including Chief Judge Walker, could "see on [her] face that [she] was carrying the weight of not only [her] family but the lesbian and gay community as well." *Id.*

On August 4th, 2010, the Court issued a written opinion and order holding Prop 8 unconstitutional. *Perry*, 704 F. Supp. 2d at 1003. The court's opinion also addressed the status of the videotapes. It stated that "[t]he trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law" and then specifically directed the clerk "to file the trial recording under seal *as part of the record*." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010) (emphasis added).

Neither party appealed the sealing direction in the court's order.

B. The Proponents Enforce The Sealing Order While The Appeal Of The Merits Is Pending.

In 2011, while the appeal of the merits of the court's decision was pending, the Proponents learned that Chief Judge Walker, who had retired from the bench, had been using excerpts of the videotapes of trial in public appearances. The Proponents thus asked that the tapes be returned, and the Plaintiffs filed a cross-motion that the videotapes be unsealed. *Perry*, 667 F.3d at 1083.

On February 2, 2012, five days *before* the Ninth Circuit issued its opinion addressing the constitutionality of Prop 8, that court issued an opinion reversing the trial court's decision to unseal the videotapes. The court stated that its opinion had "nothing to do with the freedom of the press to publish, describe, or comment on any information to which it obtains access." *Perry*, 667 F.3d at 1080. Instead, it said that its ruling addressed only the question of "whether a recording purportedly made for the sole purpose of aiding the trial judge in the preparation of his opinion, and then placed in the record and sealed, may *shortly thereafter* be made public by the court." *Id.* at 1081 (emphasis added).

The court assumed that the common-law right of access applied to the videotapes, as a public record in a judicial proceeding. *Id.* at 1084. But the court held there was a "compelling reason in this case for overriding the common-law right": namely, the fact that the Proponents "reasonably relied on Chief Judge Walker's specific assurances . . . that the recording would not be broadcast to the public, *at least in the foreseeable future*." *Id.* at 1084–85 (emphasis added). The court did not give a specific timeframe for the length of time that the common-law right of access would be overcome by the court's assurances that the videotapes would not be publicly broadcast. However, it did cite a local rule providing that sealed documents would be presumptively unsealed ten years after a case is closed. *See* Local Rule 79-5(f) (eff. 2010); Local Rule 79-4(g) (current version). That local rule thus forms the outer boundary of the parties' reasonable expectation for sealing—though, as explained below, there is no compelling reason to wait a decade.

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C. The Supreme Court Ultimately Determines That Bans On Same-Sex Marriage Are Unconstitutional.

In the years following this Court's initial landmark decision, the federal courts determined the legal issue at the heart of the case: whether the Constitution prohibits state bans on same-sex marriage. In this very case, the Ninth Circuit initially affirmed the court's ruling, and the U.S. Supreme Court dismissed the Proponents' appeal for lack of standing. *Hollingsworth II*, 133 S. Ct. at 2659. That ruling kept in place the district court's holding that Prop 8 was unconstitutional, and California began recognizing marriages of same-sex couples. On the same day the Supreme Court dismissed the Proponents' appeal, it also held that the federal Defense of Marriage Act—which prohibited the federal government from recognizing valid state marriages of same-sex couples—was unconstitutional. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013).

Two years later, the Court conclusively resolved the central issue. In its landmark ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court held that "the Fourteenth Amendment requires a State to license a marriage between two people of the same sex." *Id.* at 2593. In an appendix to its opinion, the court discussed the various lower court rulings that had addressed the issue, and it included both the district court and Ninth Circuit opinion in this case. *Id.* at 2608 (Appendix A). To KQED's knowledge, this is the only case of all those cited in this historic litigation campaign in which a complete video record of a federal trial on the merits is available.

Since 2015, all fifty states and the District of Columbia have issued marriage licenses to same-sex couples.

D. The Continuing Public Interest In The Prop 8 Trial.

From the beginning of the Prop. 8 trial, the public was intensely interested in the historic trial that presented opposing views on same-sex marriage in a neutral public forum. For example, when the Northern District of California changed its local rule to allow cameras, tens of thousands of people notified the Court that they favored camera coverage of the trial proceedings, even though the feedback that the Court invited was as to only the general local rule and not case-specific. *Hollingsworth I*, 558 U.S. at 202 (Breyer, J., dissenting). After the U.S. Supreme Court banned broadcast coverage of the trial proceedings, interested parties actually had actors recreate each day of trial testimony and argument based on the transcripts, with actors playing the judge,

the lawyers, and the witnesses.[2] These "re-enactments" of the trial were performed in cities—and sometimes on city streets—in various places across the country.[3] Indeed, a LexisNexis search of news stories returns over 7,500 separate articles about "Proposition 8" from 2010 alone—and there were doubtless countless many thousands more stories that were broadcast on radio, television, posted on social media, or published in sources not captured by LexisNexis.

In the years since, the public has continued to be keenly interested in the historic Prop 8 trial, though the intense, day-to-day scrutiny faded. For instance, in 2016, "Proposition 8" still returned over 700 hits in a search of LexisNexis news sources. And the issue of gay rights and gay marriage broadly continues to be one of substantial public interest. More importantly, the public has shown a continual interest in audio-visual depictions of the trial itself, not merely news accounts of the proceedings. The trial transcripts were used as the basis for a noted play, *8*, that was performed on Broadway in 2011, broadcast in 2012, and then adapted for a radio play in Australia in 2014.[4] Multiple documentaries have been made about the case and the issue, including the acclaimed *The Case Against 8*, which was released in theaters and aired on HBO in 2014. And the public's appetite for depictions of the Prop 8 case continues almost literally to this day: on March 3, 2017, an episode of *When We Rise*, a docuseries that aired on ABC, featured an extended recreation of the Prop 8 trial, with acclaimed actors playing Chief Judge Walker, the noted attorneys on each side, and even the witnesses.[5]

Several outside groups likewise recognized the substantial public interest in the videotapes. The National Center for Lesbian Rights, for instance, believes that the Prop 8 trial was a "watershed moment in the history of LGBT rights" and that unsealing of the tapes will "help the public more fully understand the arguments and evidence that this Court (and ultimately the U.S.

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[2] http://www.marriagetrial.com, homepage archived at https://perma.cc/4E66-R76K.

[3] *See, e.g.*, "Testimony: Equality on Trial w/ Marisa Tomei and Josh Lucas," https://www.youtube.com/watch?v=CwBsnklZpwM (informal reenactment by actors in West Hollywood, California); "Prop 8 Trial Reenactment—Pershing Square, Downtown LA," https://www.youtube.com/watch?v=SVIS5_vao6E.

[4] https://en.wikipedia.org/wiki/8_(play)

[5] http://www.imdb.com/title/tt5554612/?ref_=tt_eps_cu_n

Supreme Court) heard and used to validate the constitutional rights of LGBT persons in the decorum of this historic trial." Decl. of Kate Kendell at ¶ 4. The It Gets Better Project, which releases videos meant to inspire hope for young LGBT people facing harassment, has determined that unsealing of the videos "will exponentially expand the audience that can view the evidence and argument," which serves the It Gets Better Project's educational mission. Decl. of Seth Levy at ¶ 4.

E. Intervenor KQED's Interest.

Intervenor KQED operates the nation's most listened to public radio station and the most popular public television stations in the San Francisco Bay Area. KQED also has its own news division, KQED News, which publishes and broadcasts "The California Report," which provides daily coverage of news and culture throughout the State of California. KQED serves millions of listeners and viewers in the Bay Area, California, and around the world each week. Decl. of Scott Shafer at ¶ 2.

As a public broadcaster, KQED is uniquely situated to assess the desire its viewers, listeners, and readers have to view the unsealed videotapes of the historic Prop 8 trial. *Id.* at ¶¶ 3–4. That desire remains extremely strong. San Francisco was not only the site of the Prop 8 trial; it also has a large gay and lesbian population, and the advocacy history of its residents—by both those who are LGBT ("lesbian, gay, bisexual, transgender") and those who are not—makes it one of the most important cities in the history of the gay rights movement. Many members of the public have learned about the Prop 8 trial through other media—from news reports to documentaries to magazine articles—but there is no substitute for the insight and illumination that only the videotaped record of the trial can provide. *Id.* at ¶ 5.

Counsel for KQED sought defense counsel's stipulation that the videotape record be unsealed, but trial counsel refused to stipulate to unseal any portion of the videotapes. See Declaration of Thomas R. Burke at ¶ 4.

Accordingly, KQED brings this Motion to unseal the tapes, which are currently in the custody of the Clerk of Court as sealed records of this proceeding. KQED is committed to making publicly available whatever portion of the tapes are unsealed in a way that educates the public and

provides context for the historic document that is finally being made available. In particular, if the videotapes are unsealed, KQED intends to produce an educational television special and a separate radio special, and also make available online key moments of the trial. Shafer Decl. at ¶ 6.

ARGUMENT

THE VIDEOTAPE RECORDS MUST BE UNSEALED BECAUSE THE PUBLIC INTEREST IN DISCLOSURE NOW FAR OUTWEIGHS THE INTEREST IN HAVING THE TAPES REMAIN SEALED.

Now is the appropriate time to unseal the videotape records of this historic trial. As public court records, the videotapes are subject to the common-law right of access, and the presumption of access that applies can be overridden only by "sufficiently compelling reasons." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). Whatever reasons that could previously override the presumption of access are no longer applicable, many years after trial and the disposition of this case on appeal. Further, the First Amendment provides independent grounds to unseal these records. Last, the First Amendment would also override the entirely arbitrary and excessive 10-year timeframe for unsealing provided by a potentially applicable Local Rule.

A. Unsealing Is Required Under The Common-Law Right of Access.

1. The Common-Law Right Of Access Applies To The Sealed Videotapes.

Courts in the Ninth Circuit "start with a strong presumption in favor of access to court records." *Foltz*, 331 F.3d at 1135. The right of access to court records includes the right to obtain copies of videotapes and audiotapes as they are introduced into evidence during a trial. *Valley Broadcasting Co. v. United States District Court*, 798 F.2d 1289, 1294 (9th Cir. 1986) (rejecting trial court's stated reasons for refusing to provide public with copies of tapes introduced into evidence); *see also United States v. Mouzin*, 559 F. Supp. 463, 463–64 (C.D. Cal. 1983) (permitting media to copy video and audio tapes used at trial). This is because "what transpires in the courtroom is public property." *In re Nat'l Broadcasting Co., Inc.*, 653 F.2d 609, 614 (D.C. Cir. 1981) (granting post-verdict access to video and audio tapes played to the jury at trial).

The tapes here—which form an audiovisual record of what occurred in open court during a historic trial—are thus the very definition of "public property" to which the common-law right of

access attaches. Every moment of what was recorded was open to the public, and every line uttered by a participant was captured in the transcript. Moreover, the videotapes themselves were relied on by the court as it made its decision on the records, so the videotapes are no different than other documentary evidence or court transcripts that are also presumptively available for inspection by the public. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (recognizing "a general right to inspect and copy public records and documents, including judicial records and documents"); *Marisol A. v. Giuliani*, 26 Media L. Rep. 1151, 1154 (S.D.N.Y. 1997) (noting that a "strong" presumption of access attaches to a report prepared pursuant to court order because it was likely to play an important role in the Court's performance of its Article III function).

The Ninth Circuit did not call into question the district court's 2011 conclusion that the common-law right of access applied to the videotapes, *see Perry*, 667 F.3d at 1084, and there is no justification to conclude otherwise here. There can be no dispute that the videotapes are presumptively available for public access.

2. Due To The Passage Of Time And Changed Circumstances, No Compelling Reason To Seal Defeats The Common-Law Right Of Access.

None of the usual justifications for maintaining these videotapes under seal apply here. **First**, the common-law right of access is often not applied to traditionally private documents—such as grand jury records, *see In Re Special Grand Jury (For Anchorage, Alaska)*, 674 F.2d 778, 781 (9th Cir. 1982), and search warrants and related materials for an ongoing investigation, *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989)—but there is no tradition of secrecy for videotapes of complete judicial proceedings that were fully open to the public. Tradition thus cannot justify sealing here.

Second, considerations related to the litigation or the litigants, such as concerns about privacy, the threat of harassment, or prejudice to ongoing proceedings, cannot justify the continued sealing of the tapes either. None of these interests apply in 2017. In 2010, for instance, the Supreme Court noted that "witness testimony may be chilled if broadcast," and it also noted that Proponents' witnesses were worried about potential harassment due to their involvement in

the case. *Hollingsworth I*, 558 U.S. at 195. Likewise, when the Ninth Circuit discussed the propriety of sealing the tapes in 2011 and 2012, the Proponents had identified ongoing harassment of witnesses and supporters of the Proposition as a reason that the common-law presumption of access could be overcome. *See* Proponents' 9th Cir. Br., Dkt. No. 31 at 40–41. These concerns were acutely felt in 2011, because, at that time, Proponents were "appealing both the judgment invalidating Proposition 8 and the district court's subsequent denial of [their] motion to vacate that judgment," which made it "quite possible that this case will be retried in the future." *Id.* at 42

But many years have passed since those justifications were last articulated, and there is now a drastically changed calculus on these points. The decision on the merits is no longer on appeal; there is no longer any potential for retrial; and the legal issue is no longer an open question. Further, whatever concerns the Proponents' supporters had for privacy have long since disappeared: given the extensive reporting on the case in all media, including through reenactments of the case through transcripts, the Proponents' key participants are known to anyone with an Internet connection. Both witnesses for the Proponents, for instance, have Wikipedia pages that extensively discuss their testimony,[6] and have had their testimony dissected, discussed, and reenacted in a variety of venues.[7] Given the publicity and the time that has passed since the trial, if ever there were an instance where the privacy interests of defendants can no longer be a concern, it is this one.

Just as importantly, the views of at least one of the two witnesses for the Proponents has changed. On June 23, 2012—several months *after* the Ninth Circuit last considered whether the videotapes here could be open to public inspection—Proponents' witness David Blankenhorn publicly reversed his position. In a remarkable op-ed in the New York *Times*, Blankenhorn announced that "the time has come for [him] to accept gay marriage and emphasize the good that

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[6] https://en.wikipedia.org/wiki/Kenneth_P._Miller and https://en.wikipedia.org/wiki/David_Blankenhorn.

[7] http://afer.org/blog/witness-testimony-kenneth-miller/; http://afer.org/blog/trial-day-11-prop-8-proponents-witness-testimony-continues/; https://www.youtube.com/watch?v=MeZ0GIy8l4Q (extensive reenactment of testimony of David Blankenhorn from the play *8*).

it can do." He declared that his new work would be "to help build new coalitions bringing together gays who want to strengthen marriage with straight people who want to do the same."[8] This highly-relevant information could not factor into the Ninth Circuit's decision that the tapes here remain sealed, of course, because Blankenhorn's public reversal came months *after* the court issued its decision.

Given the years that have passed since trial, the fact that there is no potential retrial, and the public reversal of one of two witnesses for the Proponents, then, the possibility of any meaningful harm from unsealing the tapes that could come to the people involved in the trial or to the determination of the legal issues has dissipated. *See Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Arizona*, 156 F.3d 940, 947 (9th Cir. 1998) (noting an important distinction between "closing a proceeding" in the moment and the "decision to seal forever the content of in camera proceedings"). The possibility of harm is certainly too remote to outweigh the "strong presumption" of access that applies to public records of a federal court. *Foltz*, 331 F.3d at 1135.

Finally, the Ninth Circuit in 2012 found that Proponents' reliance on the district court's statement that the trial would not be broadcast was a compelling justification for overcoming the common-law right of access. *See Perry*, 667 F.3d at 1084–88. But the court did not state that perpetual sealing as a result of that understanding would be justified; instead, the Ninth Circuit stated that, in failing to appeal Chief Judge Walker's decision to continue recording the trial and place the tapes under seal upon conclusion of the case, "Proponents reasonably relied on Chief Judge Walker's specific assurances—compelled by the Supreme Court's just-issued opinion—that the recording would not be broadcast to the public, *at least in the foreseeable future*." *Id.* at 1084-85 (emphasis added); *see also Perry*, 667 F.3d at 1081 (noting that the question in the case was whether the tapes "may *shortly thereafter* [i.e., soon after the trial concluded] be made public by the court." (emphasis added)).

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[8] http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html

Thus, the question the Ninth Circuit's decision leaves open is not *if* the records will be unsealed, but *when*. After all, Proponents cannot have reasonably on a promise that the videotapes would have been sealed permanently. That is because under the Local Rules in place at the time, sealed records become presumptively public ten years after a case is closed. *Perry*, 667 F.3d at 1085 n.5. Therefore, by not appealing the aspect of the court's order placing the videotapes under seal in the same manner as any other court record, Proponents implicitly accepted that the records would be subject to release at some point.[9] Therefore, their major disagreement must have been with the idea of broadcast during or soon after the trial and while the appeal was pending. The litigation at that point had little to do with what would happen five years later.

Balancing the various interests, then, the records should now be unsealed. Whatever risk of harm came from unsealing the tapes in 2012 or the years immediately following has dissipated. There is no risk of retrial, nor a meaningful risk of harassment. There is simply no current value that can justify continued government sealing. Thus, the "strong presumption" of access attaches and requires the videotapes to be unsealed. *Foltz*, 331 F.3d at 1135.

B. The First Amendment Independently Requires The Videotapes Be Unsealed.

1. The First Amendment Requires A Compelling Reason To Maintain A Record Under Seal.

As the Supreme Court repeatedly has recognized, court proceedings are presumptively open to the public. Indeed, "[a]s early as 1685, Sir John Hawles commented that open proceedings were necessary so 'that truth may be discovered in civil as well as criminal matters.'" *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) (citation omitted). This tradition of openness "is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 580 n.17

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[9] Moreover, permanent sealing is rarely justified, and can typically only be effected by express operation of law. *Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Arizona*, 156 F.3d 940, 948 n.2 (9th Cir. 1998) (noting that that "permanent sealing is justified … by law" in some instances, such as the "sealing of portions of hearing related to grand jury proceedings"). There is no rational reason that videotaped records of otherwise public proceedings must be sealed permanently.

(1980) ("[H]istorically both civil and criminal trials have been presumptively open.").

Public access to court proceedings is indispensable because it allows "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Indeed, courts have long-recognized that "the trial of [civil] causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because . . . every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

Since the Ninth Circuit's decision in this case in 2012, that court has clarified that the First Amendment places an especially high bar in front of those wishing to maintain civil records under seal. In *Courthouse News Serv. v. Planet*, 750 F.3d 776 (9th Cir. 2014), the court resolved an open question and definitively held that the First Amendment granted the media rights of access to records in civil proceedings. *Id.* at 786–87. The court explained that "access to public proceedings and records is an indispensable predicate to free expression about the workings of government," *id.* at 785, and therefore held that federal courts should not abstain from determining the question of whether a local courts' denial of prompt access to civil complaints violated the First Amendment, *id.* at 793.

Separately, in *Oliner v. Kontrabecki*, 745 F.3d 1024 (9th Cir. 2014), the Ninth Circuit clarified that a district court may not seal an entire court record absent "compelling reasons" for doing so. As particularly relevant here, the court applied that demanding standard even where both parties requested that the records would be sealed. *Id.* at 1025. Instead, even if all parties agree to sealing, there must be "compelling reasons" to "overcome the strong presumption in favor of maintaining public access to court records." *Id.* These recent decisions emphasize just how strong a showing Proponents must make here, in 2017, to continue maintaining the videotapes under seal. They cannot meet that high standard here.

2. There Is No Longer A Compelling Interest In Sealing Here.

Under the compelling interest standard, to maintain the videotapes under seal, Proponents must establish that "(1) closure serves a compelling interest; (2) there is a substantial probability

that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives that would adequately protect the compelling interest." *Oregonian Publ'g Co. v. District Court*, 920 F.2d 1462, 1466 (9th Cir. 1990). Proponents cannot meet this demanding standard.

The Ninth Circuit recognized a compelling interest that applied in 2012 to keep the records sealed: that preserving "the integrity of the judicial process" was "a compelling interest that in these circumstances would be harmed by the nullification of the trial judge's express assurances" that the videotapes would not be publicly broadcast. *Perry*, 667 F.3d at 1088. But, now that the merits have long been decided and there are no direct harms that would come from unsealing the tapes, protecting the "integrity of the judicial process" actually cuts the other way. That is, the unsealing of the tapes would "'bring to bear the beneficial effects of public scrutiny upon the administration of justice,'" *Courthouse News Serv.*, 750 F.3d at 786 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975)), and thereby *enhance* the "integrity of the judicial process"—not undermine it, as the court held unsealing would have in 2012, when the courts were in the midst of deciding the controversial legal question at issue.

Moreover, now that many years have passed since trial, the First Amendment and the purpose for which the court authorized the recording are no longer in tension. As the Ninth Circuit recognized in 2012, the local rules in place at the time prohibited video recording in court for the purpose of public broadcasting or televising. *Perry*, 667 F.3d at 1082. Accordingly, the district court made the recording to aid its decisionmaking—just like any other aid, such as a court transcript—and placed it under seal "as part of the record." *Id.* at 1083. At the time, then, the access demanded by the First Amendment was in some tension with the prohibition on broadcasting dictated by the local rules and required by the unique circumstances of the trial and appeal.

But seven years later, there is no longer the possibility of simultaneous broadcast or transmission of the trial. Rather, if this Court were to unseal the tapes and make them available for inspection, KQED and other media members and non-profit organizations like ItGetsBetter.org and members of the general public could use it just as they would another court record: to

illuminate the historical record and examine the workings of the judicial branch of government. *See* Shafer Decl. at ¶ 6, Kendall Decl. at ¶ 4–5, Levy Decl. at ¶ 3–4. A "simultaneous broadcast" that can affect the outcome of trial, impact the participants, or change the outcome on appeal is no longer a possibility. Thus, the First Amendment's compelling interest in preserving the integrity of the judicial augurs in favor of unsealing the videotaped records.

C. The Public Will Benefit From Making The Videotapes Public.

As the Ninth Circuit has made clear, "live testimony"—not a bare transcript—is the "indispensable" foundation of our adversary system. *United States v. Thoms*, 684 F.3d 893, 905 (9th Cir. 2012) (holding that a district court must see and hear live, in-person testimony before reversing the credibility determination made by a magistrate judge). Indeed, "trial judges and juries in our circuit and all over the country rely on the demeanor evidence given by live testimony everyday, and they find it quite valuable in making accurate decisions." *Id*. The value to the public of viewing the full demeanor evidence the district court considered in this historic trial thus is hard to overstate.

Moreover, the circumstances of the Prop 8 Trial mean that these particular videotapes contain unique emotional and educational information that no transcript can provide. Those who actually testified believe that "video will uniquely show why marriage is important" to same-sex couples because only video will "capture the emotion that was part of every day of trial." Decl. of Sandra B. Stier at ¶ 7. The actual video testimony differs substantially from the reenactments, because most reenactments have portrayed the witnesses as "brave and confident" when in fact the record will show them to be "vulnerable." *Id.* at ¶ 8. And those who were in the courtroom think it will be particularly revealing to watch the videotape of "other witnesses that spoke about their experiences dealing with Proposition 8 or living as a lesbian or gay person," Perry Decl. at ¶ 10, so that the public can see the "tears" and "emotion" that no transcript can sufficiently convey. *See United States v. Bergera*, 512 F.2d 391, 393 (9th Cir. 1975) (noting that "dry records" cannot convey the same "immediate impressions" as live testimony, and so are often inferior tools for decisionmaking).

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Moreover, the record here reveals that a variety of organizations plan to make productive, educational uses out of the videotapes and put them in context. KQED, the It Gets Better Project, the National Center For Lesbian Rights all intend to review and analyze the tapes and present them in a way that enlightens and illuminates and does not merely sensationalize what happened in the courtroom. *See See* Shafer Decl. at ¶ 6, Kendall Decl. at ¶ 4–5, Levy Decl. at ¶ 3–4. There will thus be substantial public benefit, and no downside, to unsealing the tapes.

D. The Arbitrary Ten-Year Time For Unsealing In The Local Rules Must Give Way To The Common-Law And Constitutional Right Of Access.

As explained, both the common-law right of access and the First Amendment require the court to unseal the videotapes now, in 2017. These considerations also trump the local rule that may otherwise provide that the records be unsealed until either 2020 or 2022—depending on what date this Court considers this case "closed."[10]

The local rule in effect at the time of trial provided that "[a]ny document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed." Local Rule 79-5(f) (eff. 2010). The local rule also provided that "a party that submitted documents that the Court placed under seal in a case may, upon showing good cause at the conclusion of the case, seek an order that would continue the seal until a specific date beyond the 10 years provided," but no party sought such an order here. As applied here, this arbitrary ten-year time for unsealing violates the constitutional and common-law directive that records be open for public inspection absent compelling reasons.

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[10] The ten-year timeline for presumptive unsealing provided by Local Rule runs from the date a case is "closed." *See* Local Rule 79-5(f) (eff. 2010); Local Rule 79-4(g) (current version). The ambiguity in the application of the rule arises because it is not entirely clear when this case was closed. On August 4, 2010, the district court ordered the Clerk of Court to enter judgment in favor of Plaintiffs, ECF No. 708 at 136, and then again on August 12, 2010 ordered the judgment be entered "forthwith," ECF No. 727. But no separate judgment was apparently ever entered. Instead, in a ministerial order by Chief Judge Ware, dated August 27, 2012, the Clerk was formally instructed to "close this file," though it had been effectively closed for years before that. ECF No. 842.

At the threshold, the local rules of this Court—just like any other rules or statutes—must give way when they conflict with the First Amendment or other legal rules with supremacy over local rules. *Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 94 (3d Cir. 1988) (holding that local rule governing extrajudicial statements was invalid as applied because it "violate[d] [the parties'] rights to freedom of speech"); *United States v. Columbia Broad. Sys., Inc.*, 497 F.2d 102, 107 (5th Cir. 1974) (local rule banning all in-court sketches was unconstitutionally overbroad); *see generally Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 128 (1864) (local rules may be adopted "provided such rules are not repugnant to the laws of the United States").

As applied here, requiring the videotapes to remain under seal until at least 2020—and possibly even 2022—violates the First Amendment and the common-law right of access. Adhering to the outer boundaries of that rule would permit the sealing of videotaped records well beyond the point at which there remains a compelling reason for keeping the records sealed. The First Amendment requires that records be unsealed unless a "compelling reason" requires them to be unsealed, not when a given deadline expires. *See supra* § B.2 (discussing the "compelling interest" standard in *Oregonian Publ'g Co.*, 920 F.2d at 1466).

Moreover, the ten-year timeline set by Local Rule for unsealing appears to be completely arbitrary and is far too long to justify under the First Amendment. Not all sets of local rules address automatic unsealing, but many courts that do have such rules have adopted much shorter timeframes for automatic unsealing than ten years: the Eastern District of Pennsylvania, for instance, provides for presumptive unsealing two years after the conclusion of the civil action, *see* E.D. Pa. Local Rule 5.1.5 (b)(2), while the Western District of North Carolina provides that any sealed records "shall be unsealed at the time of final disposition of the case," unless otherwise ordered, *see* W.D.N.C. Local Rule 6.1(H)(1). These rules are consistent with the kind of openness that the First Amendment demands and that the public often benefits from. The local rule here, by contrast, substitutes a constitutionally-required "compelling interest" standard with an arbitrary 10-year timeframe that is far too long as applied to the interests at stake in this case. The Constitution requires the videotapes to be unsealed now, not sometime next decade.

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CONCLUSION

For all the reasons stated, the videotaped records of the trial proceedings in the Prop. 8 case should be immediately unsealed and made available for public inspection by Intervenor KQED and all other interested parties.

DATED: April 28, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al., Plaintiffs, v. GAVIN NEWSOM, in his official capacity as Governor of California, et al., Defendants, and DENNIS HOLLINGSWORTH, et al., Defendants-Intervenors.	CASE NO. 09-CV-2292-WHO **DEFENDANTS-INTERVENORS' MOTION TO CONTINUE THE SEAL** Date: June 17, 2020 Time: 2:00 p.m. Judge: Hon. William H. Orrick Location: Courtroom 2, 17th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions, Statutes, and Rules

Other

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on June 17, 2020, at 2:00 p.m., or as soon as the matter may be heard, Defendants-Intervenors will move the Court, the Honorable William H. Orrick presiding, to continue the seal on the videotape recordings of the trial proceedings in this matter.

INTRODUCTION

A video recording of the trial in this case exists for one reason and one reason only: former Chief Judge Vaughn Walker's solemn assurances, in specific response to Proponents' firm objection to the recording of the trial, that he was making the video recording *solely* for his use in chambers to assist him in crafting a decision. As the Ninth Circuit held in rebuffing an earlier effort to access and broadcast the recording, Judge Walker both before and after trial made "unequivocal assurances that the video recording at issue would not be accessible to the public," *Perry v. Brown*, 667 F.3d 1078, 1085 (9th Cir. 2012)—representing, indeed, that any such risk "had been *eliminated*," *id.* (quoting *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010)).

This commitment was compelled by binding law and "by the Supreme Court's ruling in this very case." *Id.* at 1087–88. In the weeks before trial, Judge Walker had tried to arrange the broadcast of the proceedings. But that effort was flatly contrary to this Court's own Local Rules, which at the time prohibited recording trial proceedings for broadcast or public dissemination. N.D. CAL. L.R. 77-3 (2009). So extraordinary was Judge Walker's attempt to circumvent this rule that the Supreme Court found it necessary to exercise its supervisory power over the federal judicial system by entering an emergency stay halting Judge Walker's efforts. *See Hollingsworth v. Perry*, 558 U.S. 183 (2010).

Accordingly, had Judge Walker not solemnly committed that the recordings were being made *solely* for his use *in camera*, the creation of those recordings would have plainly violated this Court's local rules, which "have the force of law," *id.* at 191 (quotation marks omitted), and Proponents "would very likely have sought an order directing him to stop recording forthwith, which, given the prior temporary and further stay they had just obtained from the Supreme Court, they might well have secured," *Perry*, 667 F.3d at 1085. And because Local Rule 77-3 forbade not only the public broadcast of trial proceedings but also the *recording* of those proceedings for *later*

dissemination and broadcast, had Judge Walker at the end of the trial not placed the recordings under seal and publicly assured Proponents that any risk of their public dissemination "had been eliminated," *Perry*, 704 F. Supp. 2d at 944, his actions would again have violated the Rule, and Proponents would again have been forced to seek the extraordinary intervention of a higher court. The Ninth Circuit recognized all of this eight years ago, holding in a unanimous opinion by Judge Reinhardt that because of Judge Walker's repeated and solemn assurances, "the integrity of the judicial system" demanded that "the recording must remain under seal." *Perry*, 667 F.3d 1087. The arguments for lifting the seal now are no more persuasive today.

The seal on the video recordings must be maintained for multiple independent reasons. Local Rule 77-3 unambiguously bars the broadcast of the recordings—today no less than eight years ago—displacing any common-law right that might otherwise require public disclosure. And Local Rule 79-5—which makes certain documents filed under seal presumptively publicly available ten years after the case is closed—does not require disclosure either. Rule 79-5's general rules governing sealed filings do not apply to the recordings here; and even if Rule 79-5 could be read as applying, its terms, too, would be overridden by Rule 77-3's *specific* rule forbidding public dissemination and broadcast of this *particular* type of sealed document. Finally, even if there *were* a common-law right eventually to access the recordings (there is not), and even if Rule 79-5 *did* presumptively require unsealing after 10 years (it does not), the recordings here must still remain sealed. For the foundational interest the Ninth Circuit identified in 2012—"[t]he interest in preserving respect for our system of justice," *Perry*, 667 F.3d at 1088—is still compelling and still requires that the records be kept under seal. "[T]he integrity of the judicial system," *id.* at 1087, is a value that knows no expiration date; and ensuring that "our justice system [continues] to function properly," *id.* at 1088, will be an interest of the highest order for as long as that system endures.

Accordingly, the seal protecting the video recordings from disclosure must be permanently maintained. While this Court previously rejected that contention in its January 17, 2018 Order provisionally unsealing the recordings on August 12, 2020, it was wrong to do so. The Court should reconsider the matter and hold that the seal must remain in place.

BACKGROUND

1. This case began as a challenge to the constitutionality of California's Proposition 8, which provided that "[o]nly marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5. The suit was assigned to the Honorable Vaughn R. Walker, who at the time was the Chief Judge of the Northern District of California. The state officials named as defendants declined to defend Proposition 8, but official proponents of the voter-initiated measure and their ballot measure committee (collectively "Proponents") intervened and defended against Plaintiffs' claims.

As the case proceeded, Judge Walker expressed a strong desire to videotape and broadcast the trial, and he importuned counsel for the parties to consent to the idea. Proponents objected to both videotaping and broadcasting the trial, repeatedly warning that several of their witnesses would decline to testify if the proceedings were broadcast. *See Hollingsworth v. Perry*, 558 U.S. 183, 186, 195 (2010). On December 21, 2009 (three weeks before the start of trial), a group of media outlets (collectively the "Media Coalition") informed the district court of the group's interest in providing "camera coverage to broadcast and webcast the . . . trial proceedings." Dkt. #313. On January 6, 2010 (five days before the start of trial), Judge Walker announced that the trial proceedings would be streamed live to several courthouses in other cities and that the trial would be video recorded for daily broadcast via the internet.

Proponents objected, citing the district court's local rules prohibiting, consistent with longstanding judicial policy, the recording and broadcast of judicial proceedings. Judge Walker, as the Supreme Court later described, then "attempted to revise [the local] rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States," in order "to allow broadcasting of this high-profile trial without any considered standards or guidelines in place." *Hollingsworth*, 558 U.S. at 196.

2. On the morning of January 11, 2010, just before commencement of the trial, the Supreme Court entered a temporary emergency stay, directing that Judge Walker's order "permitting real-time streaming is stayed except as it permits streaming to other rooms within the confines of the courthouse in which trial is to be held" and that "[a]ny additional order permitting

broadcast of the proceedings is also stayed." *Hollingsworth v. Perry*, 558 U.S. 1107 (2010). This temporary stay was set to expire on Wednesday, January 13, when the Court would enter a decision on Proponents' stay application. *Id*.

At the opening of trial later that morning, Plaintiffs asked Judge Walker to continue recording the proceedings for subsequent public broadcast "in the event the stay is lifted" on January 13. Trial Tr. at 15 (Vol. 1). Judge Walker accepted this proposal over Proponents' objection that recording the proceedings was not "consistent with the spirit of" of the Supreme Court's temporary stay. *Id.* at 16.

Far from lifting the stay, on January 13, the Supreme Court reaffirmed and extended the stay "pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus." *Hollingsworth*, 558 U.S. at 199. As the Supreme Court explained, Judge Walker's "eleventh hour" attempt to amend the district court's rules to permit public broadcasting of the trial outside the courthouse was procedurally invalid. *Id*. His efforts were also contrary to the longstanding, considered policy of the Judicial Conference of the United States against such broadcasts, *see id*. at 193–94, as well as the then-existing version of Local Rule 77-3, which had "the force of law" and prohibited "public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding," *id.* at 191 (quoting Rule 77-3). Thus, as the Supreme Court concluded, the district court's attempt to broadcast the trial "complied neither with existing rules or policies nor the required procedures for amending them." *Id*. at 196. The Supreme Court further concluded that even had Rule 77-3 been validly amended to allow the public broadcast of selected trials pursuant to a pilot program, this "high-profile trial that would include witness testimony about a contentious issue" was "not a good one for a pilot program." *Id*. at 198–99.

3. Early the next day, Proponents filed a letter with Judge Walker "request[ing] that [he] halt any further recording of the proceedings in this case, and delete any recordings of the proceedings to date that have previously been made." Dkt. #452. Proponents explained that the Supreme Court's ruling made clear that Local Rule 77-3 "banned the *recording* or broadcast of court proceedings." *Id.* (quoting *Hollingsworth*, 558 U.S. at 187).

A few hours later, Judge Walker opened that day's proceedings by reporting that, "in light of the Supreme Court's decision yesterday, . . . [he was] requesting that this case be withdrawn from the Ninth Circuit pilot project." Trial Tr. at 674 (Vol. 4). Proponents then asked "for clarification . . . that the recording of these proceedings has been halted, the tape recording itself." *Id.* at 753. When Judge Walker responded that the recording "ha[d] *not* been altered," Proponents reiterated their contention (made in their letter submitted earlier that morning) that, "in the light of the stay, . . . the court's local rule . . . prohibit[s] continued tape recording of the proceedings." *Id.* at 754 (emphasis added).

Judge Walker nevertheless insisted on recording the trial over these objections. *See* Trial Tr. at 754. Judge Walker stated that Rule 77-3 "permits . . . recording for purposes of use in chambers," and indicated that the recording "would be quite helpful to [him] in preparing the findings of fact." *Id.* He assured Proponents that "that's the purpose for which the recording is going to be made going forward. *But it's not going to be for purposes of public broadcasting or televising*." *Id.* (emphasis added). Proponents relied on these assurances in acceding to Judge Walker's insistence on continuing the video recording. As the Ninth Circuit concluded, "Judge Walker could not lawfully have continued to record the trial without assuring the parties that the recording would be used only for a permissible purpose." *Perry v. Brown*, 667 F.3d at 1087. For "[h]ad Chief Judge Walker not made the statement he did, Proponents would very likely have sought an order directing him to stop recording forthwith, which, given the prior temporary and further stay they had just obtained from the Supreme Court, they might well have secured." *Id.* at 1085. Lest there be any doubt, Proponents would *definitely* have sought such an order.

Consistent with this assurance, on January 15, Judge Walker withdrew this case from the pilot program that had purportedly authorized public broadcast of the trial. *See* Dkt. #463. Based on Judge Walker's unequivocal commitment and the withdrawal of the order purporting to authorize public broadcast, Proponents took no further action to prevent the recording.

On May 18, 2010, the Media Coalition informed this Court of its "interest in recording, broadcasting and webcasting the closing arguments." Dkt. #670. A few weeks later, Judge Walker denied that request. *See* Dkt. #682.

On May 31, Judge Walker *sua sponte* invited the parties "to use portions of the trial recording during closing arguments." Dkt. #672. The parties were instructed to "maintain as strictly confidential any copy of the video pursuant to paragraph 7.3 of the protective order," *id.*, which restricts "highly confidential" material to the parties' counsel and experts and to the district court and its personnel. *See* Dkt. #425 at 8–9. Plaintiffs requested and were given a copy of the recording of the entire trial, *see* Dkt. #675, brief excerpts of which they played during closing argument, *see* Dkt. #693 at 2961, 2974–77. Intervenor San Francisco requested and was given portions of the trial recording, Dkt. #674, but did not play any of the recording during closing argument. Proponents neither requested nor received a copy of the trial recording.

After closing argument, Proponents moved Judge Walker for an order requiring that all copies of the trial recording be returned to the Court immediately. *See* Dkt. #696. On August 4, 2010, Judge Walker issued his substantive ruling declaring Proposition 8 unconstitutional, and in it, he denied this motion. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 929 (N.D. Cal. 2010). Instead, he "DIRECTED" the clerk to "file the trial recording under seal as part of the record" and allowed Plaintiffs to "retain their copies of the trial recording pursuant to the terms of the protective order." *Id.* Elsewhere in the same order, Judge Walker stated that "the potential for public broadcast" of the trial proceedings "had been *eliminated*." *Id.* at 944 (emphasis added).

4. Despite Rule 77-3, the policies of the Judicial Conference and this Court's Judicial Council, the Supreme Court's prior decision in this case, the sealing order, and his own solemn commitment in open court, Judge Walker, while delivering a speech at the University of Arizona on February 18, 2011, played a portion of the video recording of the cross-examination of one of Proponents' expert witnesses, who had testified at trial in reliance on Judge Walker's promise that the recording would not be publicly broadcast outside the courthouse. *See* Judge Vaughn Walker, History of Cameras in the Courtroom at 33:13–37:04 (Feb. 18, 2011), *available at* https://goo.gl/ZG8qji. The speech was videotaped by C-SPAN, and it was subsequently broadcast on C-SPAN several times beginning on March 22. *See* C-SPAN, Judge Vaughn Walker on Cameras in the Courtroom, https://goo.gl/Rj7CYq ("Airing Details"). Less than two weeks later, Judge Walker resigned from the bench, but he continued to display excerpts from the trial recording in connection

with his teaching and public speaking. *See* Dkt. #816-1 ex. 20.

Promptly after learning of Judge Walker's activities, on April 13, Proponents moved the Ninth Circuit (where the appeal in this case was pending) to order the return of all copies of the trial recording. *See* Appellants' Mot. for Order Compelling Return of Trial Recordings, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 13, 2011), Dkt. #338-1. On April 15, Plaintiffs opposed that motion and filed a cross-motion to unseal the trial recording. *See* Pls.-Appellees' Opp'n to Mot. Regarding Mot. to Unseal, *Perry*, No. 10-16696 (9th Cir. Apr. 15, 2011), Dkt. #340. On April 18, the Media Coalition moved to intervene for the "purpose of joining in the Motion to Unseal filed by Plaintiffs-Appellees," asserting that the "profound" "interest of the Media Coalition in [that issue] cannot be denied." Media Coal.'s Mot. to Intervene at 1–4, *Perry*, No. 10-16696 (9th Cir. Apr. 18, 2011), Dkt. #343.

On April 27, the Ninth Circuit transferred all those motions to this Court for resolution. *See* Order, *Perry v. Brown*, No. 10-16696 (9th Cir. Apr. 27, 2011), Dkt. #348-1. The next day, Judge Ware, who had replaced Judge Walker as the presiding judge, issued an order requiring "[a]ll participants in the trial, including [Judge Walker], who are in possession of a recording of the trial proceedings" to appear at a hearing on Proponents' motion and to "show cause as to why the recordings should not be returned to the Court's possession." Dkt. #772 at 2. Shortly thereafter, Judge Walker lodged with this Court the chambers copy of the trial recording that he had taken with him when he left the bench and was excused from the hearing. *See* Dkt. ##777, 791.

On June 14, 2011, Judge Ware denied Proponents' motion for the return of all copies of the trial recordings and set a subsequent hearing to consider the cross-motion to lift the seal on the trial recording. Dkt. #798. He found "no indication" that any party had "violated the terms of the Protective Order" and thus concluded that the parties "may retain their copies of the trial recordings." *Id*. at 4. The district court "g[ave] notice that it intend[ed] to return the trial recordings to Judge Walker as part of his judicial papers," and invited "[a]ny party who objects" to "articulate its opposition" in supplemental briefing. *Id.* at 5. In response, Proponents filed a supplemental brief opposing the return of the trial recording to former Judge Walker. Dkt. #806.

On August 29, this Court held the hearing on the motion to lift the seal. *See* Dkt. #810. On

September 19, Judge Ware granted that motion, concluding that the common-law right of access applies to the recording and requires that it be made public. Dkt. #812 at 6–8. Accordingly, he directed the clerk "to place the digital recording in the publicly available record of this case." *Id.* at 2. In the same order, Judge Ware directed that a copy of the recording be returned to Judge Walker.

5. Proponents immediately appealed and asked the Ninth Circuit to stay the order lifting the seal. *See* Mot. for Stay Pending Appeal, *Perry v. Brown*, No. 11-17255 (9th Cir. Sept. 23, 2011), Dkt. #3-1. The Ninth Circuit granted Proponents' motion for a stay, *Perry v. Brown*, No. 11-17255 (9th Cir. Oct. 24, 2011), Dkt. #16, and in February 2012, in a decision authored by Judge Reinhardt, it concluded that this Court had abused its discretion in ordering that the seal be lifted.

Beginning with the common-law right of access that Judge Ware had relied upon, the Ninth Circuit assumed without deciding that the right applied, but found a "compelling reason"—namely, the need to uphold "judicial integrity"—"for overriding the common-law right." *Perry*, 667 F.3d at 1084–85. The court focused on Judge Walker's "unequivocal assurances that the video recording at issue would not be *accessible to the public*." *Id.* at 1085 (emphasis added). Those assurances came in two forms: (1) his oral statement, "following the Supreme Court's issuance of a stay against the public broadcast of the trial," that "he was going to continue 'taking the recording for purposes of use in chambers,' but that the recording was 'not going to be for purposes of public broadcasting or televising,' " *id.*; and (2) the statement in his written opinion that "the potential for public broadcast in the case had been *eliminated*," *id.* (quoting *Perry*, 704 F. Supp. 2d at 944). These statements, the court concluded, foreclosed any chance that the sealing of the trial recording might "be subject to later modification" because Judge Walker "promised the litigants that the conditions under which the recording was maintained *would not change*—that there was *no possibility* that the recording would be broadcast to the public *in the future*." *Id.* at 1086 (first emphasis in original; additional emphases added). The Ninth Circuit thus concluded that Judge Walker made "solemn commitment[s]" that were "worthy of reliance" and "compelled by the Supreme Court's ruling in this . . . case"—and that Proponents "reasonably relied" on them. *Id*. at 1086–87.

In light of Judge Walker's unequivocal assurances, the Ninth Circuit observed, "[i]t would be unreasonable to expect Proponents . . . to foresee that a recording made for such limited purposes

might nonetheless be *released for viewing by the public*, either during or *after the trial*." *Id.* at 1085 (emphases added). Absent those assurances, the court stated, "Proponents would very likely have sought an order" forcing Judge Walker "to stop recording" or "ensur[ing] that the recording would not be made available for public viewing." *Id.*

The Ninth Circuit then affirmed "the importance of preserving the integrity of the judicial system," *id.* at 1087, and explained that "[l]itigants and the public must be able to trust the word of a judge if our justice system is to function properly," *id.* at 1087–88; *see also id.* at 1081. "To revoke Chief Judge Walker's assurances after Proponents had reasonably relied on them," the court held, "would cause serious damage to the integrity of the judicial process"—damage that provides a " 'compelling reason' . . . to keep the recording sealed." *Id.* at 1087; *see also id.* at 1088. Because any order unsealing the recording "would permit the broadcast of the recording for all to view," *id.* at 1080, the Ninth Circuit held that "to preserve the integrity of the judicial system, the recording must remain under seal," *id.* at 1087.

Finally, the Ninth Circuit made short work of the Media Coalition's additional argument that "the First Amendment right of public access" requires that the seal be lifted. *Id.* at 1088. The court assumed without deciding that "the First Amendment applies" to "civil proceedings," but nevertheless concluded that "the integrity of the judicial process is a compelling interest that in these circumstances would be harmed by the nullification of the trial judge's express assurances, and that there are no alternatives to maintaining the recording under seal that would protect the compelling interest at issue." *Id.*

The Ninth Circuit thus "reverse[d] the order of the district court as an abuse of its discretion and remand[ed] with instructions to maintain the trial recording under seal." *Id.* at 1088–89. The Ninth Circuit additionally ordered that "the district court shall not return to former Chief Judge Walker the copy of the recording that he has lodged with the court." *Id.* at 1089 n.7. Approximately three weeks later, the Ninth Circuit issued its mandate to this Court. *See* Mandate, *Perry v. Brown*, No. 11-17255 (9th Cir. Feb. 24, 2012), Dkt. #74. And on August 27, 2012, this Court entered its final judgment and ordered the Clerk to close the case. *See* Dkt. #842.

6. Less than five years later, KQED, one of the members of the Media Coalition,

renewed its efforts to obtain and broadcast the video recording of the trial. On April 28, 2017, KQED filed a second motion to unseal the video recordings, reiterating essentially the same arguments it had advanced before this Court in 2012. Lifting the seal and making the recordings available for broadcast is "required under the common-law right of access," KQED maintained, and "the First Amendment provides independent grounds to unseal [the videotapes]." Dkt. #852 (initial capitalization omitted). According to KQED, the Ninth Circuit's 2012 decision in *Perry* did not foreclose its request "because so much has changed since the Ninth Circuit ordered that the tapes remain sealed." *Id.* at 1. On May 31, 2017, Plaintiffs filed a response supporting KQED's second motion to unseal. Dkt. #867. The State Defendants likewise filed a short notice indicating they did not oppose the request. Dkt. #869. Proponents opposed the motion. Dkt. #864.

Because Judge Ware had retired in 2012, KQED's motion was referred to Judge William H. Orrick. Judge Orrick held a hearing on the motion on June 28, 2017, and on January 17, 2018, he entered an order ruling on the motion. Dkt. #878. While the Court concluded that the Ninth Circuit's decision in *Perry* continued to "preclude[ ] [the videotapes'] release at this juncture," it "further rule[d] that the recordings shall be released to [KQED] on August 12, 2020, absent further order from this Court that compelling reasons exist to continue to seal them." *Id.* at 14–15. The Court accepted KQED's argument that "the common-law right of access applies to the video recordings." *Id.* at 10. And while it concluded that "the compelling justification identified by the Ninth Circuit in 2012—namely, judicial integrity—continues to exist and precludes release of the video recordings at this juncture," the Court did not believe that this justification "exists in perpetuity." *Id.* at 12. Rather, the Court determined that the consideration found determinative by the Ninth Circuit in *Perry* was circumscribed by "the rules of *this court*," *id.* at 13—in particular, Civil Local Rule 79-5's provision that "[a]ny document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed." Finally, the Court also held that the "analysis would be no different [under the] First Amendment right of access instead of the common-law right of access," since "compelling justifications must exist to satisfy both standards." *Id.* at 14.

Accordingly, the Court ordered that the recordings "shall be released to [KQED] on August

12, 2020, absent further order from this Court that compelling reasons exist to continue to seal them." *Id.* at 15. Although judgment in the case was not actually entered—and the case therefore not formally closed—until August 27, 2012, Dkt. #842, the Court reasoned that it was "functionally . . . 'closed' " two years earlier, on August 12, 2010, when Judge Walker had first entered a permanent injunction against Proposition 8—and it therefore calculated the 10-year period from that date in 2010. *Id.* at 13. The Court provided that any motion by Proponents to continue the seal should be filed no later than April 1, 2020. *Id.* at 15.

Proponents appealed the Court's January 17, 2018 Order to the Ninth Circuit, but on April 19, 2019, that court dismissed the appeal "without prejudice for lack of jurisdiction." Mem. Order, *Perry v. Schwarzenegger*, No. 18-15292 (Apr. 19, 2019), ECF No. 57-1. The Ninth Circuit concluded that this Court's order provisionally unsealing the video recordings on August 12, 2020, was not an appealable final decision in light of the Order's invitation of a further motion to continue the seal. Proponents now move to continue the seal.

ARGUMENT

The Court should continue to keep the video recordings under seal for the same reasons that it should have denied KQED's motion to lift the seal in the first place. The common-law right of access does not apply to the recordings to begin with, for multiple independent reasons; this Court's Local Rule 79-5 likewise does not require the recordings' public release after 10 years—and it certainly does not do so as early as August 12 of this year, given that the case was not formally closed until August of 2012; and binding precedent forecloses any suggestion that the disclosure and public dissemination of the video recordings is required by the First Amendment.[1] This Court previously rejected these arguments in its January 17, 2018 Order, but it was wrong to do so, and it should reconsider them now, resolve them in Proponents' favor, and hold that the video recordings must remain permanently under seal.

I. THE COMMON-LAW RIGHT OF ACCESS DOES NOT REQUIRE THE UNSEALING AND PUBLIC DISSEMINATION OF THE VIDEO RECORDINGS AFTER 10 YEARS.

A. Any Common-Law Rules Governing Access to the Video Recordings Are

[1] Proponents also preserve all of the additional arguments against lifting the seal articulated in their brief opposing KQED's motion to lift the seal, Dkt. #864.

Displaced by Local Rule 77-3.

"[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). While this traditional right "historically developed to accomplish many of the same purposes as are advanced by the first amendment," it "is not of constitutional dimension." *Valley Broad. Co. v. United States Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1293 (9th Cir. 1986). Rather, this right of access is a "common-law right," *id.*—a judge-made right, a creature of the courts themselves, in exercise of each court's "supervisory power over its own records and files," *Nixon*, 435 U.S. at 598.

Because the common-law right lacks any "constitutional dimension," *Valley Broadcasting*, 798 F.2d at 1293, it may be displaced by positive law in the same fashion as any other judge-made rule. Federal courts "do not possess a general power to develop and apply their own rules of decision," and so the few, isolated enclaves of federal common law exist only by "necessary expedient." *City of Milwaukee v. Illinois and Michigan* (*Milwaukee II*), 451 U.S. 312, 314 (1981). And where positive, enacted law "addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 304. Thus, "federal regulations may . . . pre-empt the field of federal common law." *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 107 (1972).

Indeed, this displacement is demonstrated by the very Supreme Court decision that first recognized the common-law right of access to judicial records. In *Nixon v. Warner Communications*, the Court dealt with an attempt by media broadcasters to access President Nixon's Watergate tapes, which had been introduced into evidence in the criminal trial of several of Nixon's associates. The Supreme Court assumed for the sake of analysis that the common-law right of access applied to the tapes, and it noted that accordingly "we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts." 435 U.S. at 602. The Court concluded, however, that it "need not decide how the balance would be struck" between these interests, because access to the tapes was instead governed by the Presidential Recordings Act. *Id.* at 603. "[T]his congressionally prescribed avenue of public

access," the Court held, was "a decisive element in the proper exercise of discretion with respect to release of the tapes," *Id.* at 605–06, 607. "Simply stated, the policies of the Act can best be carried out under the Act itself." *Id.* at 606. *See also United States v. Mouzin*, 559 F. Supp. 463, 464 (C.D. Cal. 1983) (noting that in *Nixon*, "the Court . . . found that Congress had displaced the common law right of access as to presidential tapes by the Presidential Recordings Act").

Following *Nixon*, courts have repeatedly found the common-law right of access displaced by positive law. The Ninth Circuit, for instance, has held that 11 U.S.C. § 107(b)'s limitations on when bankruptcy-court filings may be disclosed "displaces the common law right of access" because it "speaks directly to, and diverges from, the common law right." *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 430 (9th Cir. 2011). Similarly, the common-law right of access is supplanted by FED. R. CRIM. P. 6(e)'s rules governing recording and disclosure of grand jury proceedings. *See, e.g.*, *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998). And it is likewise displaced by FED. R. CIV. P. 5.2, which does not permit documents containing minors' names to be unsealed unless they are redacted. *See Offor v. Mercy Med. Ctr.*, 167 F. Supp. 3d 414, 447 (E.D.N.Y. 2016), *aff'd in part*, *vacated in part*, 676 F. App'x 51 (2d Cir. 2017) (Rule 5.2 "overcomes the presumptive common-law right of access to judicial documents").

As in these examples, any common-law right of access here has been displaced by a positive enactment governing access to the video recordings in question: Rule 77-3. That Rule was promulgated pursuant to Congress's authorization to "all courts established by Act of Congress" to "prescribe rules for the conduct of their business," 28 U.S.C. § 2071, and the Supreme Court has confirmed that it has "the force of law," *Hollingsworth*, 558 U.S. at 191. Because Rule 77-3 bars the public dissemination of the video recordings at issue in this case, it directly forecloses KQED's claim that it may access and broadcast the recordings under the common law.

Rule 77-3 provides:

> Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of

> courtroom proceedings and presentation of evidence within the confines of the courthouse is permitted, if authorized by the Judge or Magistrate Judge.

N.D. Cal. L.R. 77-3.

By its plain terms, this provision expressly prohibits not only the "recording . . . in the courtroom . . . [of] any judicial proceeding," but also the "public broadcasting or televising" of such a recording. *Id.*; *see also Hollingsworth*, 558 U.S. at 184. Nor does the Rule draw any distinction between live broadcasting during a trial and subsequent broadcasting of a video recording of the trial; rather, it applies by its plain terms regardless of when the public dissemination occurs. Indeed, the obvious import of the prohibition on "recording for those purposes" is to extend the prohibition against "public broadcasting or televising" to subsequent broadcasts of recorded proceedings. Accordingly, Judge Walker's decision to record the trial proceedings over Proponents' objection was lawful only on the basis of his unequivocal representation that the recording would be used only in chambers and would not be publicly broadcast beyond the confines of the courthouse. In like form, his decision to place the trial recording in the record was lawful only because he did so under seal, thereby preventing its public dissemination. And it necessarily follows that lifting the seal on August 12, 2020 to permit public dissemination and broadcasting of the trial proceedings is plainly contrary to the Rule.

This Court's January 17, 2018 Order rejected this conclusion, reasoning that "a recording of the proceedings *was made* and was, without separate objection by Proponents, made part of the trial record." Dkt. #878 at 11. Accordingly, the Court reasoned that "Rule 77-3 . . . [does not] preclude the public's right of access from attaching to the video recordings." *Id.* But neither of these actions granted the Court license to disregard Rule 77-3's dictates. As just shown, and as the Ninth Circuit has found, the recording "*was made*," *id.*, because—and *only* because—of Judge Walker's "unequivocal assurances . . . that the recording was 'not going to be for purposes of public broadcasting or televising,' " *Perry*, 667 F.3d at 1085. Likewise, Proponents did not act to prevent the inclusion of the recordings as "part of the trial record," Dkt. #878 at 11, *only because* of Judge Walker's simultaneous order maintaining them under seal and his solemn, unequivocal promise that any "potential for public broadcast" was thereby "eliminated." *Perry*, 704 F. Supp. 2d at 929, 944.

Because of these repeated assurances—and the extraordinary intervention of the Ninth Circuit and the Supreme Court, at Proponents' request—the recordings have thus far remained under seal, preventing their "public broadcasting or televising," in compliance with Rule 77-3. Those assurances cannot be cast aside now.[2]

Accordingly, the public release and dissemination of the video recordings would be flatly contrary to Rule 77-3, which "speaks directly to" whether the trial recording may be publicly broadcast and thus clearly preempts any common-law right of access that might otherwise apply. *American Elec. Power v. Connecticut*, 564 U.S. 410, 424 (2011).

B. The Common-Law Right of Access Does Not Apply to Wholly Derivative Documents Such as the Video Recordings.

The common law does not require the disclosure and broadcast of the video recordings for another reason: the common-law right simply does not apply to documents like these, which merely record testimony and proceedings that occurred in the courtroom and were open to the public.

The decision in *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996), is closely on point. In *McDougal*, a group of media interests sought access to a videotape of deposition testimony by President Clinton, which he had made pursuant to FED. R. CRIM. P. 15 as a witness in a criminal trial of two individuals under prosecution in connection with the Whitewater scandal. The videotaped deposition testimony was presented to the jury in open court, in proceedings that were open to the public and the press; and a transcript of the deposition was entered into evidence and contemporaneously released to the public and members of the press. *Id.* at 653. The press, however, also sought to obtain a copy of the video recording of the deposition. The district court denied that request, and the Eighth Circuit affirmed. *Id.* at 654, 660.

The court assumed that when the videotape of President Clinton's deposition was "played in open court," it was thereby "introduced into evidence," *id.* at 655, 656; but it nonetheless held "as a

[2] Nor does the analysis change because "the current Northern District and Ninth Circuit rules and policies *allow* for public broadcast of proceedings." *Id.* at 11. The current version of Rule 77-3 permits "public broadcasting or televising" *only* for cases "participati[ng] in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States," and that exception was not lawfully added to the Rule until after the trial in this case had occurred. *See Hollingsworth*, 558 U.S. at 196. In all events, this case was formally *withdrawn* from the invalid pilot program by Judge Walker, so it plainly cannot authorize public broadcast of the trial recording here.

matter of law that the videotape itself is not a judicial record to which the common law right of public access attaches" because of its derivative character. Rather than "recordings of the primary conduct of witnesses or parties," the Eighth Circuit reasoned,

> the videotape at issue in the present case is merely an electronic recording of witness testimony. Although the public had a right to hear and observe the testimony at the time and in the manner it was delivered to the jury in the courtroom, we hold that there was, and is, no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony.

Id. at 657. So too here. The trial proceedings in this case were "open to the public," *id.* at 653, and the written transcripts of these proceedings have long ago been "released to the public." *Id.* at 653. There simply is "no additional common law right to obtain" a video of the proceedings. *Id.* at 657.

This Court's earlier decision attempted to distinguish *McDougal*, reasoning that the case "dealt with a markedly different situation" because here "the video recordings at issue are recordings *of the court proceedings themselves*, not a prior recording of testimony simply played at trial." Dkt. #878 at 11. Not so. The recording in *McDougal* was also a recording of a "court proceeding [ ]" itself—witness testimony offered in the underlying trial, which only happened to be presented by videotape because the court had concluded that "exceptional circumstances" warranted President Clinton's testimony by video deposition rather than in open court. *See* FED. R. CRIM. P. 15(a); *see also McDougal*, 103 F.3d at 653.

Indeed, to the extent any distinction exists between the two video recordings, the recording in *this* case is even *more* obviously derivative. The broadcasters in *McDougal*, ironically, offered a similar characterization of the deposition recording there as a reason that *access was required*, arguing that the recording should be treated "like any other piece of evidence introduced or used in the courtroom." *Id.* at 655. But the court in *McDougal rejected* any such distinction, concluding that the taped deposition testimony must be treated as derivative, just like any "other electronic recording of live witness testimony in the courtroom," in order to ensure "that Rule 15 deponents are treated equally to witnesses who testify in court, in person." *Id.* at 657. The January 17, 2018 Order's attempt to distinguish *McDougal* thus gets the matter exactly backwards; in fact, *McDougal*'s reasoning applies *a fortiori* to the recordings here.

That Order also sought to brush *McDougal* aside as purportedly contrary to "the strong

presumption in favor of copying access applicable in the Ninth Circuit to audio and videotape exhibits as they are received in evidence during a criminal trial." Dkt. #878 at 11–12 (quotation marks omitted). But that rejoinder simply begs the question, since the recordings here are not "videotape exhibits . . . received in evidence during a . . . trial," they are derivative recordings *of the trial itself*. Thus—for the very reasons *McDougal* identifies—this presumption *does not apply*.

Indeed, far from applying "to all judicial and quasi-judicial documents," the common-law right of access has no application "when there is neither a history of access nor an important public need justifying access." *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989). Nor does it apply to documents that "have traditionally been kept secret." *Id.* There is, of course, no history of access to video recordings of federal trial proceedings; and the video recordings in this case in particular are akin to private documents not traditionally exposed to the public. *See Perry*, 667 F.3d at 1090, 1087. Nor is there an important public need to access them, given that the trial itself was open to the press and public and the official transcript is readily available.

C. Any Common-Law Right of Access Continues To Be Overridden by the Compelling Reasons To Maintain the Seal.

Even if the common law right of access did apply, it would not justify unsealing the video recordings because of the compelling interest in judicial integrity that the Ninth Circuit identified in *Perry*. "The common law right of access . . . can be overridden given sufficiently compelling reasons for doing so." *Perry*, 667 F.3d at 1084 (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)); *see also Nixon*, 435 U.S. at 603. "[P]ublic perception of judicial integrity" is an "interest of the highest order." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1666 (2015) (quotation marks omitted). And as the Ninth Circuit squarely held in *Perry*, "[t]he interest in preserving respect for our system of justice is clearly a compelling reason for maintaining the seal on the recording" in this case. *Perry*, 667 F.3d at 1088. This Court has no power to depart from that holding now—both because it has become the law of this case, *see Bernhardt v. Los Angeles Cty.*, 339 F.3d 920, 924 (9th Cir. 2003), and because it controls under ordinary principles of stare decisis, *see Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987).

As the Ninth Circuit recounted at length in *Perry*, Judge Walker provided "unequivocal

assurances that the video recording at issue would not be accessible to the public." 667 F.3d at 1085. He "promised the litigants that the conditions under which the recording was maintained *would not change*—that there was no possibility that the recording would be broadcast to the public in the future." *Id.* at 1086. These "solemn commitment[s]" were "worthy of reliance," *id.*, and Proponents in fact "reasonably relied" on them, *id.* Unsealing the recording now would renege on those solemn commitments, and thus "would cause serious damage to the integrity of the judicial process," for not only would it result in a palpable injustice to the litigants and witnesses who took Judge Walker at his word, it would put future litigants and witnesses on notice that judicial promises cannot be trusted. *See id.* at 1087.

In addition, based on "decades of experience and study," the Judicial Conference has found that the public broadcast of trial proceedings can "create privacy concerns," "increase[ ] security and safety issues," and escalate "[t]hreats against judges, lawyers, and other participants." Dkt. #771-2 at Ex. 3; *see also Hollingsworth*, 558 U.S. at 193. These findings are based on the Judicial Conference's study of ordinary cases. "[I]n 'truly high-profile cases' one can '[j]ust imagine what the findings would be.' " *Hollingsworth*, 558 U.S. at 198 (second alteration in original). Indeed, Proponents consistently opposed broadcast in this trial precisely because they fear that public dissemination of the trial video would subject them and their witnesses to well-substantiated risks of harassment. As the Supreme Court noted, those concerns have been "substantiated" by "incidents of past harassment." *Id*. at 195. The record in this case is replete with evidence of repeated—and frequently serious—harassment of Proposition 8 supporters.[3] For example, "donors to groups supporting Proposition 8 'have received death threats and envelopes containing a powdery white substance,' " and "numerous instances of vandalism and physical violence have been reported against those who have been identified as Proposition 8 supporters." *Id*. at 185–86. If Judge

[3] *See, e.g.*, Dkt. #187-2 ¶¶ 11–12 (discussing harassment); Dkt. #187-9 ¶¶ 6–8 (declaring that supporters "were physically assaulted" and had "homes and automobiles defaced"); Dkt. #187-11 (collecting 71 articles that discuss harassment of supporters); Dkt. #187-12 ¶¶ 5–6 (discussing physical assault and vandalism); *see also* Thomas Messner, *The Price of Prop 8*, THE HERITAGE FOUNDATION (Oct. 22, 2009), https://goo.gl/XsJSqT (cataloging harm to supporters); Amicus Curiae Brief of Marriage Anti-Defamation Alliance, *Hollingsworth v. Perry*, No. 12-144 (U.S. Jan. 29, 2013) (same); *Gay Marriage Mob Violently Attacks Elderly Woman*, YOUTUBE (Nov. 11, 2008), https://goo.gl/xj1kwQ.

Walker's repeated and unequivocal assurances that "there was no possibility that the recording would be broadcast to the public in the future," *Perry*, 667 F.3d at 1086, are now disregarded, that would send a clear message to witnesses—reasonably concerned about testifying because of reasons like these—that they cannot even trust a *blanket assurance* made on the record *by a federal judge* that they will not be exposed to public exposure or harassment in this way.

While this Court's January 17, 2018 Order acknowledged "the compelling reason of judicial integrity identified by [the Ninth Circuit]," the Court thought that interest was not dispositive "because circumstances change and justifications become more or less compelling." Dkt. #878 at 13. But the importance of judicial integrity has no statute of limitations. No, the imperative that "[l]itigants and the public must be able to trust the word of a judge" is structural and permanent. *Perry*, 667 F.3d at 1087–88. No "changed circumstances" can diminish the necessity that our justice system continues to "function properly." *Id.* at 1088.

What is more, none of the supposed "changed circumstances" identified by the Court's previous Order has actually lessened the hazards of publicly disseminating the video recordings. The January 17 Order suggested that the issues disputed in the trial are now governed by "settled law," given the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and that there now is "wider acceptance of same-sex marriage." *Id.* at 8–9. But the Supreme Court's settling of a legal issue does not eliminate the passions surrounding a controversial social issue. For example, the Supreme Court held that the Constitution includes a right to an abortion over forty years ago, but the Northern District of California recently enjoined the release of videos of abortion providers in part because of the risk that "harassment, threats, and violent acts" would increase were the materials made public. *National Abortion Fed'n v. Center for Med. Progress*, 2016 WL 454082, at *20 (N.D. Cal. Feb. 5, 2016).

Contrary to the January 17 Order's reasoning, the Supreme Court's holding that the Constitution includes a right to same-sex marriage *increases* the concerns of those who disagree, because their views have now been rejected by the Supreme Court and removed from democratic policy making. While the Court—*in recognition of this very concern*—went out of its way to insist that those who "continue to advocate" against same-sex marriage should not be "disparaged" and

must be "given proper protection," *Obergefell*, 135 S. Ct. at 2602, 2607, the unavoidable result of the Court's ruling is that many who might have regarded support for traditional marriage as debatable five years ago now consider it deplorable. That increases (rather than eliminates) Proponents' concerns about harassment and reprisals. *See id.* at 2642 (Alito, J., dissenting).

The January 17, 2018 Order also suggested that publication of the trial recordings would not "adversely affect" Proponents because "the transcript of the trial has been widely disseminated and dramatized in plays and television shows." Dkt. #878 at 9. But the trial transcript and trial video recordings are simply not interchangeable. Were they the same, the media would have no *desire* to obtain the recordings, since they have already possessed the transcript for nearly a decade. Indeed, this Court itself recognized that "the video recordings will carry significant and unique weight," thus refuting the analogy to the transcript and dramatizations. *Id.* at 6.

This Court should continue to keep faith with Judge Walker's word, and the seal should remain in place.

II. LOCAL RULE 79-5 DOES NOT REQUIRE THE UNSEALING AND PUBLIC DISSEMINATION OF THE VIDEO RECORDINGS AFTER 10 YEARS.

In ordering the eventual release of the video recordings, this Court's January 17, 2018 Order relied upon the Local Rule 79-5, Filing Documents Under Seal in Civil Cases, subsection (g) of which provides in full as follows:

> **Effect of Seal**. Unless otherwise ordered by the Court, any document filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. Any document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed. However, a Submitting Party or a Designating Party may, upon showing good cause at the conclusion of a case, seek an order to extend the sealing to a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records disposition policy of the United States Courts.

N.D. Cal. L.R. 79-5(g).[4]

Seizing on a single reference to this Rule in dicta from the Ninth Circuit's decision in *Perry*,

[4] At the time of the *Hollingsworth* trial, a provision substantively similar to current Rule 79-5(g) was in effect as Local Rule 79-5(f). *See* N.D. CAL. L.R. 79-5(f) (2010) (superseded July 2, 2012), *available at* https://goo.gl/DxMgrc.

667 F.3d at 1085 n.5, the Court's previous Order concluded that the Rule's 10-year period negates any compelling interest in keeping the recordings "under seal in perpetuity," and instead presumptively requires that they be unsealed after 10 years. Dkt. #878 at 10. But for multiple reasons, this Rule does not justify lifting the seal.

A. Local Rule 79-5(g) Does Not Apply to "Records" of this Nature.

To begin, the text of Rule 79-5 makes clear that the Rule addresses documents that a *party* files under seal, not derivative video-recordings lodged in the record *by the Court itself*. The Rule is entitled "Filing Documents Under Seal in Civil Cases," and it applies to documents "Electronic[ally] and Manually-Filed" by either "a registered e-filer" or "a party that is not permitted to e-file." Rule 79-5(a). Subsection (d) of the Rule sets forth procedures governing "[a] party seeking to file a document, or portions thereof, under seal," and subsection (g) provides that "a *Submitting Party or a Designating Party* may . . . seek an order to extend the sealing . . . beyond the 10 years provided by this rule." (emphasis added). The Rule is thus plainly addressed to materials filed under seal by parties, not materials created and placed in the record by the Court. It is a "fundamental canon of statutory construction that the words of a statute [or Rule] must be read in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015). Here, the Court's previous interpretation of Rule 79-5(g) as applying to materials entered in the record by the Court makes a hash out of the rest of the Rule's language.

The January 17 order reasoned that "[t]here was and is nothing in Rule 79-5 limiting the presumptive unsealing to materials filed by the parties as opposed to materials created and filed by the Court." Dkt. #878 at 13–14. But the subsection setting out Rule 79-5's scope does so explicitly, referring to "sealed documents submitted by registered e-filers in e-filing cases" and those "submitted by a party that is not permitted to e-file and/or in a case that is not subject to e-filing." Rule 79-5(a). And the very subsection at issue here, subsection (g), refers to "Submitting Part[ies]" and "Designating Part[ies]" in a way that is simply nonsensical if the Rule is applied to documents created by the court. To be sure, "Judge Walker . . . directed that the Clerk file the trial recording under seal as part of the record." Dkt. #878 at 14 (quotation marks omitted). But the recordings' presence in the record does not somehow transform them into documents *filed by a party*.

B. Local Rule 77-3's Specific Bar on Broadcasting the Video of Trial Proceedings Governs.

Interpreting Rule 79-5(g) as applying to the video recordings also conflicts with the canon that courts must not "construe two statutes [or rules] so that they conflict," but instead are "obliged to reconcile them." *Momeni v. Chertoff*, 521 F.3d 1094, 1097 (9th Cir. 2008). The reading of Rule 79-5(g) adopted by the January 17, 2018 Order—as presumptively making the recordings available for public dissemination and broadcast after ten years—heedlessly flouts that canon by creating a conflict with Rule 77-3's specific *prohibition* on the public broadcast of the recordings.

As shown above, Rule 77-3 by its plain terms prevents the public dissemination, "broadcasting or televising" of "any judicial proceeding." N.D. CAL. L.R. 77-3. And just as this rule bars the *contemporaneous* broadcast of trial proceedings, it also encompasses the video-recording and *subsequent* broadcast of the proceedings. But the Court's previous Order interpreted Rule 79-5 to demand *precisely that result*: after ten years have passed, under the reading adopted by the January 17 Order, the very "recording" that Rule 77-3 says *may not* be "broadcast[ ]," Rule 79-5(g) says *presumptively must* be released for public dissemination and broadcast. This Court should not read Rule 79-5 to presumptively require the very thing Rule 77-3 forbids. Indeed, even if Rule 79-5(g) could be read as applying in a general way to the video recordings, Rule 77-3's more specific terms *expressly prohibiting their broadcast* should still control. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1158 (9th Cir. 2004) (specific governs the general).

C. Even if Local Rule 79-5(g) Applies, the Compelling Reasons To Maintain the Seal Establish "Good Cause" for its Indefinite Extension.

Even if Local Rule 79-5(g) could be read as presumptively requiring the release of the video recordings (and as shown above, it cannot), the seal should still be maintained. For that Rule itself provides that the duration of the Court's seal may be "extend[ed] . . . to a specific date beyond the 10 years provided by this rule" by order of the Court "upon showing [of] good cause." N.D. CAL. L.R. 79-5(g). And the Ninth Circuit's decision in *Kamakana v. City and Cty. of Honolulu* makes clear that the "good cause" standard is *less* demanding than the "compelling reasons" showing required under the common-law right of access. 447 F.3d 1172, 1180 (9th Cir. 2006); *see also*

Wong v. Astrue, 2008 WL 2323860, at *1 (N.D. Cal. May 20, 2008) (Rule 79-5(g)'s "good cause" standard is the same as the "good cause" standard discussed in *Kamakana*).

Here, complying with Rule 77-3's directive that trial recordings not be made available for public broadcast is good cause for maintaining the seal. Furthermore, the Ninth Circuit has already determined in *Perry* that avoiding the harm to judicial integrity that would flow from disregarding Judge Walker's repeated, unequivocal assurances is a compelling reason to prevent exposing those recordings to public access and dissemination—a determination that the Court need not (and cannot) revisit. *See Bernhardt*, 339 F.3d at 924; *Zuniga*, 812 F.2d at 450. And as shown above, the fundamental, structural interest in judicial integrity implicated here simply does not become less compelling with the passage of time.

III. EVEN IF LOCAL RULE 79-5(G) APPLIES, ITS PRESUMPTIVE 10-YEAR PERIOD DID NOT START TO RUN UNTIL THE CASE WAS CLOSED IN 2012.

The January 17 Order not only erred in concluding that Rule 79-5(g)'s presumptive 10-year period applies to the recordings; it also erred *in calculating* when that period expires. While judgment was not entered in this case—and the case thus was not closed—until August 27, 2012, Dkt. #842, the January 17 Order concluded that the 10-year clock started on August 12, 2010, because the case was "functionally . . . 'closed' " when Judge Walker entered his permanent injunction against Proposition 8 on that date. Dkt. #878 at 13 n.20. That "functional" interpretation of Rule 79-5(g) is misguided, and the Court should reconsider the issue and correct that error.

By keying its presumptive 10-year period to the date when "the case is closed," Rule 79-5(g) provides a clear rule for calculating its deadline—one of the highest virtues of a time limit like this one. *Cf. Bonneau v. Centennial Sch. Dist. No. 28J*, 666 F.3d 577, 580 (9th Cir. 2012) ("a primary goal of statutes of limitations" is "clarity and certainty in litigation"). Calculating the 10-year deadline based on when a case is "*functionally* . . . closed," Dkt. #878 at 13 n.20 (emphasis added), *invites* confusion and ambiguity. Determining the date on which final judgment is entered and the case is marked "closed," by contrast, is a simple and unambiguous task. Here, the task yields a simple and unambiguous answer: the case was closed on August 27, 2012, when the court

ordered the "Clerk . . . [to] close this file" and the case was marked closed. Dkt. #842.[5]

IV. THE FIRST AMENDMENT DOES NOT REQUIRE THE UNSEALING AND PUBLIC DISSEMINATION OF THE VIDEO RECORDINGS.

Finally, the January 17, 2018 Order concluded that the "analysis would be no different" under the "First Amendment right of access." Dkt. #878 at 14. That Order was wrong to suggest that the First Amendment could potentially apply to the video recordings at issue here; but it was right that the First Amendment does not alter the correct conclusion.

The First Amendment does not require public access to the trial tapes in this case. Both the Supreme Court and the Ninth Circuit have squarely held that the First Amendment does not even entitle the public to access recordings submitted as evidence of illegal conduct during criminal trial; in those circumstances, the Constitution is satisfied so long as the trial is open to the public and transcripts of the recordings as played at trial are publicly available. *See Nixon*, 435 U.S. at 608–09; *Valley Broadcasting*, 798 F.2d at 1292–93; *see also Providence Journal*, 293 F.3d at 16; *Fisher v. King*, 232 F.3d 391, 396–97 (4th Cir. 2000); *United States v. Beckham*, 789 F.2d 401, 408–09 (6th Cir. 1986); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 426–28 (5th Cir. 1981). Other courts have held that the same is true of recorded witness testimony offered at criminal trials, *see McDougal*, 103 F.3d at 659, and of recordings of criminal proceedings generally, *see United States v. Antar*, 38 F.3d 1348, 1359–60 (3d Cir. 1994) (explaining that the First Amendment requires access to "the live proceedings" and "the transcripts which document those proceedings"). In light of this precedent, it follows that the First Amendment does not compel access to the recording here.

The consequences of a contrary conclusion would be startling indeed, since they would imply that the longstanding bar on the public broadcast of trial proceedings is unconstitutional. But the Supreme Court rejected this argument by implication in this very case when Plaintiffs raised it in opposition to Proponents' successful application for a stay of Judge Walker's initial broadcast order. *See* Resp. of Kristin M. Perry et al. to Application for Immediate Stay at 18–19, *Hollingsworth v. Perry*, No. 09A648 (U.S. Jan. 10, 2010). Other decisions by the Supreme Court

[5] Two days later, the Court entered a similar order, this time purporting to make its order of final judgment effective "*nunc pro tunc*" on August 12, 2010. Dkt. #843. But plainly a court cannot manipulate Rule 79-5(g) by ordering that a case be deemed to have been closed "*nunc pro tunc*" on a different date.

and the federal courts of appeals have uniformly rejected the same argument. *See, e.g.*, *Estes v. Texas*, 381 U.S. 532, 539 (1965); *id*. at 584–85 (Warren, C.J., concurring); *id*. at 588 (Harlan, J., concurring); *In re Sony BMG*, 564 F.3d 1, 9 (1st Cir. 2009); *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988); *United States v. Edwards*, 785 F.2d 1293, 1295 (5th Cir. 1986); *United States v. Kerley*, 753 F.2d 617, 621 (7th Cir. 1985); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983).

The First Amendment right of access, in any event, does not require public access to a trial recording when maintaining the recording under seal "serves a compelling interest" and "there are no alternatives . . . that would adequately protect the compelling interest." *Perry*, 667 F.3d at 1088. That standard is satisfied for all the reasons explained in *Perry*, *see id.* at 1084–88, and for all the reasons explained above, *see supra* Part I.c.

CONCLUSION

This Court should permanently maintain the seal protecting the trial video recordings from public disclosure or dissemination.

Dated: April 1, 2020

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS

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EXHIBIT 3

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

This dispute concerns the court records of a historic trial: a video recording of the most comprehensive public airing of the arguments for and against the constitutional right of same-sex couples to marry that our legal system has ever produced.

More than a decade ago, two loving couples filed suit in this Court challenging California's Proposition 8, a ballot initiative that stripped gay men and lesbians of the right to marry. These Plaintiffs—Kristin M. Perry, Sandra B. Stier, Paul T. Katami and Jeffrey J. Zarrillo—alleged that Proposition 8 violated their rights to equal protection and due process under the Fourteenth Amendment of the United States Constitution. When the State declined to defend the constitutionality of Proposition 8, the official proponents of Proposition 8 under California election law voluntarily intervened to defend the ballot initiative they had championed.

In January 2010, Chief Judge Vaughn Walker held a historic, three-week public trial to determine whether Plaintiffs had a constitutional right to marry the person they loved. The Court heard sworn testimony from 19 fact and expert witnesses (17 called by Plaintiffs and two called by Proponents) on a variety of subjects relevant to Plaintiffs' claims. The expert testimony featured leading scholars and professionals in a variety of disciplines including history, psychology, political science and economics. The Court made a video recording of the trial, which it considered when reaching its decision and placed under seal as part of the record in this case. On August 4, 2010, the Court ruled in Plaintiffs' favor and found Proposition 8 to be unconstitutional.

The motion currently before the Court presents a simple question with an even simpler answer: should the public have access to the video recording of a historically significant, public trial that led to marriage equality for gay men and lesbians in California now that *ten years* have passed since the Court ruled and placed the video under seal? The answer to this question is a resounding yes.

The video recording that Proponents seek to conceal and keep out of the public discourse indefinitely is, without question, a valuable historical record of one of the most significant civil rights trials of recent times. No written transcript, reenactment, or third-party account can substitute for what can be seen and experienced on that recording, a point Proponents concede by arguing so strenuously against lifting the temporary seal. But both of Proponents' arguments to deny public access to the

video recording even ten years after the trial fail. First, far from forbidding unsealing, this Court's local rules require it, and Proponents do not come close to proving a compelling reason to maintain the seal. Second, the right of public access compels unsealing. The common-law right is not displaced by this Court's local rules, applies to all judicial "records" (including video recording), and imposes a strong presumption of unsealing that is not overcome here by any compelling reason. Moreover, the First Amendment provides an even "stronger" right of access than the common law, and properly applying the First Amendment to these unique factual circumstances would not unleash the parade of horribles Proponents purportedly fear.

The time has come—as this Court's local rules and the public right of access require—to unseal the recording for the public and historical interest, and to allow Americans today and for generations to come to witness history in the making.

BACKGROUND AND PROCEDURAL HISTORY

A. In 2010, Chief Judge Walker Presides Over A Historic, Highly Publicized Trial Concerning Proposition 8

Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo, along with the City and County of San Francisco, challenged the constitutionality of Proposition 8, which prohibited same-sex couples from marrying. Plaintiffs asserted that Proposition 8 violated their rights to equal protection and due process under the Fourteenth Amendment of the United States Constitution. The government defendants declined to defend Proposition 8, and Defendants/Intervenors, the official proponents of Proposition 8 under California election law ("Proponents"), were granted leave to intervene and defend the initiative. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010). The parties "engaged in significant discovery, including third-party discovery, to build an evidentiary record." *Id.* at 932. Thirty-four individuals were deposed, including 16 experts, nine Plaintiffs and Defendants/Intervenors, and nine third-party witnesses. Twenty of the depositions were videotaped, and Proponents made no effort to seal the videotaped depositions[1] from public view.

[1] Nineteen of the 20 videotaped depositions contain no confidentiality designation whatsoever. As for the 20th deposition, a mere four pages of the 302-page transcript were deemed confidential.

Chief Judge Walker set the action for a bench trial from January 11–27, 2010. In total, the trial lasted 13 days (approximately 77 hours) and included testimony from 19 fact and expert witnesses, including the four plaintiffs. All but three of those witnesses testified on behalf of the Plaintiffs and Plaintiff-Intervenor, accounting for over 48 hours of the total trial time. In addition to Proponents' two trial witnesses,[2] Plaintiffs also entered into evidence the deposition testimony of two of Proponents' withdrawn expert witnesses, Katherine Young and Paul Nathanson. Proponents never requested that these depositions be kept confidential, and excerpts of both are available publicly on the Internet.[3]

Given the historic nature of this trial and the impact it would have on countless lives, there was immense public interest in the trial before, during, and after it took place. The trial was highly publicized, with individuals and organizations liveblogging the trial from the courtroom, regular press conferences held by both sides, and news outlets throughout the country reporting on the trial on a daily basis. One such publication observed that "[the] courtroom doesn't have a spare inch. It's jammed with spectators, lawyers and media."[4] The trial also received worldwide news coverage, with BBC News comparing the trial "to landmark cases which ended segregation in US schools and overturned a ban on interracial marriage."[5]

The testimony was emotional and powerful. As Plaintiff Kristin Perry describes, "I willed myself to speak very personally about my hope to one day marry the woman I love, which I hoped would also highlight the universal themes of love and equality, and [by watching the recording] I think you will see how embarrassing it was to have to sit in front of my family and friends and describe all of the ways in which access to those universal dreams was not available to me in the same way that it was for others." Perry Decl. ¶ 4. "I think this generation of politicians, community leaders, and

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[2] Proponents called two expert witnesses in their defense case at trial. One of the Proponents, Dr. William Tam, was called adversely by Plaintiffs during their case.

[3] *See* https://bit.ly/2zR6P2q (Katherine K. Young deposition excerpt); https://bit.ly/2Wt3Y7w (Paul Nathanson deposition excerpt).

[4] *See, e.g.*, Howard Mintz, *Prop. 8 trial Day 1: Live coverage from the courtroom*, Mercury News (Jan. 11, 2010), https://bayareane.ws/2L1NI8a; Jordan Lorence, Alliance Defending Freedom (June 16, 2010), https://bit.ly/2xzq7IV; ShadowProof, https://bit.ly/2Wuvgun.

[5] *See, e.g.*, *US gay marriage ban challenged in federal court*, BBC News (Jan. 12, 2010), https://bbc.in/3dqAU7s.

lawmakers should see the tapes, so they can see the pain and suffering they inflict when unjust laws are put on the books." *Id.* ¶ 6.

Following the trial, on August 4, 2010, Chief Judge Walker found Proposition 8 to be unconstitutional and enjoined its enforcement. *Perry*, 704 F. Supp. 2d at 927. Proponents appealed to the Ninth Circuit, which affirmed the trial court's ruling. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). Proponents then appealed to the Supreme Court, which held that Proponents lacked standing to appeal Chief Judge Walker's decision. *See Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). The Court vacated the Ninth Circuit's decision and ordered it to dismiss Proponents' appeal for lack of jurisdiction. As a result, Chief Judge Walker's decision finding Proposition 8 unconstitutional remained in place, *id.*, permitting tens of thousands of people, including Plaintiffs, to legally marry.

In the years following the Proposition 8 trial, a play based on the trial, titled "8," used the actual trial transcripts and was performed on Broadway and in Los Angeles, and reproduced at colleges, high schools, and community centers throughout the world.[6] Celebrities reenacted the play on YouTube, reading from the trial transcript.[7] These YouTube reenactments were viewed nearly 100,000 times. A documentary about Proposition 8, *The Case Against 8*, was released in 2014. Numerous books have been published about the trial, including one written by two of the Plaintiffs, Kristin Perry and Sandy Stier.[8]

In short, this trial was the subject of intense public and historical interest. The testimony has been widely circulated and has become a part of popular culture. But except for the few individuals able to secure a seat in the courtroom, the public has been unable to witness this historic trial first-hand, and to see the witnesses' impassioned testimony and the opening and closing statements for themselves.

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[6] *See Illuminating California's Proposition 8 Trial, Onstage*, N.Y. Times (July 17, 2011), https://nyti.ms/3dh9bpT; *Brad Pitt joins star-studded Prop 8 play*, CNN (Mar. 1, 2012), https://cnn.it/3ds8cDx; *'8,' a play about Proposition 8, debuts March 3 in L.A.*, L.A. Times (Nov. 19, 2011), https://lat.ms/3fq6xQH.

[7] *See, e.g.*, https://bit.ly/2xTDGD6; *see also* Prop. 8 Trial Re-enactment, Day 1, Chapter 1, YouTube (Jan. 30, 2020), https://bit.ly/2xNngwg (viewed over 69,000 times).

[8] *See, e.g.*, Kristin Perry & Sandy Stier, *Love on Trial: Our Supreme Court Fight for the Right to Marry* (Roaring Forties Press 2017); Kenji Yoshino, *Speak Now: Marriage Equality on Trial* (Broadway Books 2016); Jo Becker, *Forcing the Spring: Inside the Fight for Marriage Equality* (Penguin Books 2015).

B. Chief Judge Walker Records The Historic Trial On Proposition 8 And Places The Video Recording Into The Record Under Seal

The trial in this matter was a public proceeding, and at no point in time was the courtroom closed. Thus, all testimony and argument from the trial is, already, a matter of public record and is in no way confidential. Of course, the timing, location, and limited seating capacity of the trial meant that many members of the public who might have wished to watch the trial first-hand could not do so.

In the weeks leading up to the January 2010 trial, Chief Judge Walker issued an order permitting the trial to be broadcast live via streaming audio and video to a number of federal courthouses around the country. *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010) ("*Hollingsworth I*"). Chief Judge Walker issued this order pursuant to an amendment to Local Rule 77-3 that permitted broadcasting for purposes of participation in a pilot program. *Id.*

On the morning of the first day of trial, the Supreme Court temporarily stayed the broadcast so it could consider in full a stay motion filed by Proponents, who objected to Chief Judge Walker's order. *Hollingsworth v. Perry*, 558 U.S. 1107 (2010) ("*Hollingsworth II*"). Two days later, the Court extended its temporary stay through the timely filing and disposition of a petition for a writ of certiorari or mandamus, holding that "the District Court's amendment of its local rules to broadcast this trial" likely did not "compl[y] with federal law." *Hollingsworth I*, 558 U.S. at 189, 199. The Court declined to "express any views on the propriety of broadcasting court proceedings generally." *Id.* at 189.

Chief Judge Walker video recorded the first two days of the trial on the basis that the Supreme Court might decide to lift the temporary stay, but after the stay became permanent, Proponents asked Chief Judge Walker to stop the recording. In response, Chief Judge Walker stated:

> The local rule permits the recording for purposes . . . of use in chambers. . . . And I think it would be quite helpful to me in preparing the findings of fact to have that recording. So that's the purpose for which the recording is going to be made going forward. But it's not going to be for purposes of public broadcasting or televising.

Perry v. Brown, 667 F.3d 1078, 1082 (9th Cir. 2012). Proponents then "dropped their objection." *Id.*

Chief Judge Walker permitted the parties to obtain copies of the recording for use in closing argument, provided that they maintained the copies under seal. *Id.* Plaintiffs used portions of the

recording in closing argument, which were visible to the public watching the trial. *See id.* at 1085. Proponents did not object to this use of the recording.

In his post-trial order finding Proposition 8 unconstitutional, Chief Judge Walker explained that "[t]he trial proceedings were recorded and used by the court in preparing the findings of fact and conclusions of law; the clerk is now DIRECTED to file the trial recording under seal as part of the record." *Perry* , 704 F. Supp. 2d at 929. Chief Judge Walker explained that "the experts' demeanor and responsiveness showed their comfort with the subjects of their expertise," and that this helped to inform his decision. *Id.* at 940. He also concluded that the "[P]laintiffs' lay witnesses provided credible testimony," based in part on his "observ[ation]" of the testimony they presented. *Id.* Chief Judge Walker permitted the parties to retain any copies of the trial recording that they had acquired "pursuant to the terms of the protective order herein" and denied Proponents' motion to order the copies' returned. *Id.* at 929. Finally, he discredited Proponents' counsel's explanation that most of Proponents' witnesses had elected not to testify out of concern for their personal safety related to the recording because Proponents "made no effort" to call certain witnesses "after potential for *contemporaneous* broadcast of the trial proceedings had been eliminated." *Id.* at 945 (emphasis added).

When Proponents appealed from the judgment finding Proposition 8 unconstitutional, they "challenged neither the denial of their motion to compel the return of the copies nor the district court's entry of the recording in the record." *Perry*, 667 F.3d at 1083. Chief Judge Walker retired from the bench soon thereafter.

C. In 2011, Chief Judge Ware Orders The Video Recording Of Trial To Be Unsealed

During the pendency of Proponents' appeal, they learned that then-retired Chief Judge Walker had played excerpts of the recording publicly, and they moved to compel all parties to return their copies of the recording. Plaintiffs—joined by several media organizations, including KQED—cross-moved to unseal the video recording. In September 2011, Chief Judge Ware granted Plaintiffs' motion. *Perry v. Schwarzenegger*, 2011 WL 4527349 (N.D. Cal. Sept. 19, 2011). He concluded that (i) the

common-law right of public access applied, (ii) neither the Supreme Court's decision issuing a stay of broadcast during trial nor Local Rule 77-3 precluded unsealing, and (iii) Proponents had made no showing sufficient to overcome the common-law right of access. *Id.* at *3–6.

D. In 2012, The Ninth Circuit Requires The Video Recording To Remain Sealed But Recognizes—Along With Proponents—That The Seal Is Not Permanent

Proponents appealed Chief Judge Ware's order. During oral argument at the Ninth Circuit, Proponents informed the panel that they expected the seal presumptively to last 10 years under the terms of the local rule then codified at 79-5(f). Judge Hawkins asked Proponents' counsel whether his clients were "under the impression that these tapes would be forever sealed." Proponents' counsel responded:

> No, your Honor, I believe that a seal lasts for—not necessarily, I guess, is the better answer. A seal lasts for 10 years under the local rules of the Northern District of California, and at the end of the . . . case, then we would be entitled to go in and ask for an extension of that time, to a specific date, but it would be a minimum of 10 years . . . .

Proponents' counsel conceded that they were "aware of the local rules."[9]

In its order, the Ninth Circuit described the "narrow[] consideration that controls [its] decision" as "whether, given the unique circumstances surrounding the creation and sealing of the recording of the trial in this case, the public is entitled to view that recording some *two years after the trial*." *Perry*, 667 F.3d at 1080 (emphasis added); *see also id.* at 1081 (describing the issue on appeal as whether the video recording may be unsealed "shortly" after trial). The Ninth Circuit assumed without deciding "that the common-law presumption of public access applies to the recording at issue here and that it is not abrogated by the local rule in question." *Id.* at 1084. Nevertheless, the Court held that the "compelling reason" of "Chief Judge Walker's special assurances . . . that the recording would not be broadcast to the public, *at least in the foreseeable future*" overcame the common-law presumption. *Id.* at 1084–85 (emphasis added).

The Ninth Circuit thus reversed Chief Judge Ware's order, but cited Local Rule 79-5's presumption that sealed records will be unsealed after ten years in limiting its holding to comply with

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[9] *See* Oral Argument at 7:04–7:48, *Perry v. Brown*, 667 F.3d 1078, 1082 (9th Cir. 2012) (No. 11-17255), https://bit.ly/35toPvJ (hereinafter "*Perry* oral argument").

Chief Judge Walker's assurances about the "foreseeable future." *Id.* at 1085 n.5.

E. In 2018, This Court Finds That The Video Recording Presumptively Should Be Unsealed In August 2020

Seven years after the trial, in 2017, KQED again moved to unseal the video recording. Dkt. 852. Plaintiffs filed a response in support of unsealing, Dkt. 867, the State Defendants indicated that they did not oppose unsealing, Dkt. 869, and Proponents opposed, Dkt. 864.

In January 2018, this Court found that, unless Proponents could demonstrate a compelling reason that the tapes should remain under seal, it would lift the seal at the ten-year mark from closure of the case as is standard practice under Local Rule 79-5. *Perry v. Schwarzenegger*, 302 F. Supp. 3d 1047, 1058 (N.D. Cal. 2018), *appeal dismissed*, 765 F. App'x 335 (9th Cir. 2019). In reaching this ultimate conclusion, the Court found: (i) the doctrines of issue preclusion, law-of-the-case, and stare decisis did not preclude consideration of KQED's motion on the merits, *id.* at 1055; (ii) Local Rule 79-5(g) "provid[es] a ten year presumptive mark for unsealing court records," *id.*; (iii) there is "no doubt that the common-law right of access applies to the video recordings as records of judicial proceedings to which a strong right of public access attaches," *id.*; (iv) "Proponents make no effort to show, factually, how further disclosure of their trial testimony would adversely affect them," *id.*; (v) "the compelling justification of judicial integrity identified in the Ninth Circuit's 2012 Order continues to apply and prevents disclosure of the video recordings through the presumptive unsealing ten year mark applicable under Civil Local Rule 79-5(g)," *id.*; and (vi) the "analysis would be no different" under the "First Amendment right of access instead of the common-law right of access," *id.* at 1058.

Proponents appealed from this Court's January 2018 order, but the Ninth Circuit dismissed the appeal for lack of jurisdiction. *Perry v. Schwarzenegger*, 765 F. App'x 335 (9th Cir. 2019).

F. Proponents Move To Continue The Seal Indefinitely

On April 1, 2020, Proponents moved to continue the seal indefinitely. Dkt. 892. Proponents urge the Court to reverse its January 2018 conclusions that both the common-law right of access and First Amendment require unsealing of video recording absent compelling justifications, and that Local Rule 79-5 presumptively requires unsealing after ten years. But Proponents' latest motion includes no evidence that Proponents or anyone who testified on their behalf would suffer *any harm* from unsealing

the video recording more than ten years after it was made—let alone harm sufficient to overcome the strong presumption of unsealing. By contrast, 15 of Plaintiffs' trial witnesses have submitted declarations affirmatively supporting the release of the trial recordings. *See* Exhibits B-P.

Counsel for Plaintiffs requested permission from Proponents' counsel to speak to the two expert witnesses Proponents called at trial, and also to Dr. Tam, in an effort to determine if they actually had any concerns about unsealing the video recording at this late date. Proponents' counsel declined to grant such permission, stating that he "polled a critical mass of our clients and witnesses," none of whom supported unsealing. Exhibit A, Dusseault Decl. ¶ 3. It is unclear from this response which, if any, of the trial witnesses were included in the "critical mass" that Proponents' counsel "polled," and Proponents' counsel's request that Plaintiffs not contact the three witnesses precludes Plaintiffs from determining whether some would support unsealing. What is clear, however, is that there is no evidence in the record that *any* trial witness has *any* concern about the unsealing of the video recording.[10]

ARGUMENT

Plaintiffs' motion should be denied, and the video recording of the trial should be unsealed, for two reasons. First, Local Rule 79-5 presumptively requires unsealing after ten years, and Plaintiffs have failed to provide a compelling reason to maintain the sealing in this case. Second, the public has a right of access to this court record, under both the common law right of access and the First Amendment.[11]

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[10] Because Dr. William Tam—one of the three witnesses aligned with Proponents during the trial—appeared pursuant to a trial subpoena served by Plaintiffs, it cannot be said that he agreed to testify in reliance on some understanding of how the video would be treated going forward. Rather, he testified because he was compelled by law to testify publicly. Another of Proponents' witnesses, expert David Blankenhorn, voluntarily published an Op Ed piece in the New York Times announcing that he had changed his mind on same-sex marriage, and thus cannot credibly claim that he has some concern about attention being drawn to his testimony. *See* David Blankenhorn, "How My View on Gay Marriage Changed," N.Y. TIMES (June 22, 2012), https://nyti.ms/2WghyuX (attached as Dusseault Decl. Ex. 2).

[11] Neither stare decisis nor law of the case prevent their unsealing. *See* Dkt. 892 at 17. Chief Judge Walker made clear that he "eliminat[ed]" the "potential for *contemporaneous* broadcast of the trial proceedings." *Perry*, 704 F. Supp. 2d at 945 (emphasis added). And, more importantly, the Ninth Circuit (and Proponents' counsel during oral argument) indicated the same understanding when they acknowledged that Local Rule 79-5 could require unsealing after 10 years. *Perry*, 667 F.3d at 1085 n.5; *Perry* oral argument at 7:04–7:48 (counsel's concession).

A. Local Rule 79-5 Presumptively Requires Unsealing After Ten Years

This Court's Local Rule 79-5 (both the version in force in 2010 and the current version) provides that, unless otherwise ordered by the Court, any document filed under seal in a civil case shall be open to public inspection ten years from the date the case is closed.[12] Proponents, despite their protestations to the contrary, previously conceded the applicability of this presumptive unsealing rule to the trial records. Having made that concession, the only remaining question is whether Proponents have demonstrated a compelling reason for the tapes to remain under seal. They have not.

1. Proponents Conceded Applicability Of The 10-Year Sealing Rule

Proponents' counsel conceded the applicability of the ten-year rule during oral argument before the Ninth Circuit in 2011, and explained that his clients were aware of and relied on that rule. This concession is binding. During argument, Judge Hawkins asked: "Were your clients under the impression that these tapes would be forever sealed?" Proponents' counsel responded, "No, your Honor, I believe that a seal lasts for—not necessarily, I guess, is the better answer. A seal lasts for 10 years under the local rules of the Northern District of California, and at the end of the . . . case, then we would be entitled to go in and ask for an extension of that time, to a specific date, but it would be a minimum of 10 years . . . ." Proponents' counsel again conceded that "we were aware of the local rules, your Honor." *Perry* oral argument at 7:04–7:48.

Eight years later, Proponents argue the opposite, and contend that Local Rule 79-5(g) does not apply to the video recording. *See* Dkt. 892 at 21. But Proponents' concession "[i]n oral argument before [the Ninth Circuit]" "is binding on it in any further proceedings in th[e] case." *Amberhill Props. v. City of Berkeley*, 814 F.2d 1340, 1341 (9th Cir. 1987); *Wagner v. Prof'l Eng'rs in Cal. Gov't*, 354 F.3d 1036, 1043 n.3 (9th Cir. 2004) (ruling that appellant was "judicially bound" moving forward by its concession at oral argument) (citing *Amberhill*, 814 F.2d at 1341).

Proponents' concession that they "were aware of the local rules" and that they did not expect

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[12] The version in force in 2010 provided: "Any document filed under seal in a civil case shall be open to public inspection without further action by the Court 10 years from the date the case is closed." Civil Local Rule 79-5(f) (in effect in 2010 <https://cand.uscourts.gov/superseded-local-rules>). The current version is substantively similar and provides: "Any document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed."

the seal to last forever was in direct response to Judge Hawkins's question. Thus, Proponents' concession was directly related to the issue at hand and was no mere "slip of the tongue." *See In re Adamson Apparel, Inc.*, 785 F.3d 1285, 1294 (9th Cir. 2015) (finding appellant's concession at oral argument binding and that the concession "was not simply a 'slip of the tongue'"); *United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991) (finding that appellant's "straightforward" oral judicial admission was binding and noting that "[a] judicial admission is binding before both the trial and appellate courts"). Absent "egregious circumstances," parties "are generally bound by admission of attorneys." *Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986). No such circumstances exist here. Accordingly, Proponents' concession is binding.

In any event, two prior decisions in this case—one by the Ninth Circuit and the second by this Court—confirm the presumptive application of Rule 79-5(g)'s ten-year rule. First, the Ninth Circuit recognized Local Rule 79-5(g)'s applicability in 2012 when it maintained the seal in light of Chief Judge Walker's assurances that the recording would not be publicly broadcast "for the foreseeable future." *Perry*, 667 F.3d at 1084–85 & n.5 (citing Local Rule 79-5's ten-year rule). Then, in 2018, this Court followed suit: "There was and is nothing in Rule 79–5 limiting the presumptive unsealing to materials filed by the parties as opposed to materials created and filed by the Court, like transcripts of judicial proceedings or the video recordings at issue." *Perry*, 302 F. Supp. 3d at 1058. The applicability of Local Rule 79-5(g) has already been decided in this case, and that decision is binding. *See Folex Golf Indus., Inc. v. O-TA Precision Indus. Co., Ltd.*, 700 F. App'x 738, 738 (9th Cir. 2017) ("Under the 'law of the case' doctrine, a district court is 'precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case,' unless [one of five exceptions] to depart from the law of the case exists." (quoting *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997))). No exception applies here.[13] *Alexander*, 106 F.3d at 876.

The only question remaining is whether Plaintiffs have presented a compelling reason to continue the seal. They have not.

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[13] "A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *Alexander*, 106 F.3d at 876.

2. Plaintiffs Fail To Show A Compelling Reason To Maintain The Seal

As this Court previously explained, to maintain the seal after the ten-year mark, Plaintiffs would need to "show compelling reasons for the seal to remain in place." *Perry*, 302 F. Supp. 3d at 1049. Plaintiffs offer not a shred of evidence, let alone "compelling" reasons, for maintaining the seal. Plaintiffs point to three alleged justifications for maintaining the seal—judicial integrity, a possible conflict with Local Rule 77-3 which prohibited public broadcast of trials, and speculation that witnesses for Proponents could be subjected to harassment. First, with respect to "judicial integrity," the same reason that the Ninth Circuit held the seal must be maintained in 2012—Proponents' expectation that the recording would remain under seal merely for the foreseeable future—now counsels in favor of lifting the seal. Simply put, there is no "judicial integrity" concern with the release of the video after the expiration of the ten-year period, because any assurance provided by the Court as to the sealing of the video was necessarily qualified by the ten-year default rule for unsealing.

Second, there is no conflict between Local Rules 77-3 and 79-5(g), and Rule 79-5(g) is the applicable Local Rule under these circumstances. The issue is not whether the Court will broadcast the trial, but rather whether the video should be unsealed and made available to the public for whatever use the public may deem appropriate.

Third, Proponents have not pointed to any evidence demonstrating that their witnesses, let alone *all* witnesses whose testimony is currently sealed, fear for their safety or security in the event the recording is unsealed or would suffer any harm whatsoever upon unsealing.

There is no compelling reason to divert from this Court's normal course in releasing sealed materials in civil cases ten years after the case is closed.

a. A Compelling Reason Is Required To Maintain The Seal

Proponents contend that they need only demonstrate "good cause" rather than "compelling reasons" to maintain the seal. *See* Dkt. 892 at 22–23. They are wrong. Although Rule 79-5(g) uses the phrase "good cause," courts have recognized that a lower "good cause" standard applies only to documents sealed as part of a non-dispositive motion; otherwise, the "compelling reasons" standard applies. *See, e.g.*, *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136–37, 1139 (9th Cir. 2003); *Plexxikon Inc. v. Novartis Pharm. Corp.*, 2020 WL 1233881, at *1 (N.D. Cal. Mar. 13, 2020)

("Civil Local Rule 79-5 *supplements* the [common law's] 'compelling reasons' standard" (emphasis added)); *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002) ("when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted" and thus the good cause standard applies).[14] The lower standard for non-dispositive motions makes sense because records accompanying such motions "are often unrelated, or only tangentially related, to the underlying cause of action," and the public has less of an interest in them. *Plexxikon*, 2020 WL 1233881, at *1. That does not describe this situation.

As discussed below, *infra* pp. 19–21, the usual presumption of the public's right of access applies, and therefore a compelling reason to maintain the video recording under seal must be shown even under Local Rule 79-5(g). Proponents can thus maintain the seal only if they show sufficiently "compelling reasons," such as if disclosure would "gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Kamakana v. City of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). The reasons courts accept as sufficiently compelling to overcome the presumption are few and narrow: "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation" is not sufficiently compelling to defeat disclosure. *Id.*; *Foltz*, 331 F.3d at 1137 (district court abused its discretion in maintaining seal when small amount of legitimately non-public information could be redacted). Ultimately, "the district court must weigh 'the interests advanced by the parties in the light of the public interest and the duty of the courts'" in deciding whether to release particular material. *Valley Broadcasting Co. v. Dist. Court*, 798 F.2d 1289, 1294 (9th Cir. 1986) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 602 (1978)).

b. Plaintiffs Demonstrate No Compelling Reason To Maintain The Seal

Plaintiffs offer three allegedly "compelling reasons" for maintaining the tapes under seal—judicial integrity, a possible conflict Local Rule 77-3 which prohibited public broadcast of trials, and

[14] Proponents cite *Wong v. Astrue*, 2008 WL 2323860, at *1 (N.D. Cal. May 20, 2008) for the proposition that "Rule 79-5(g)'s 'good cause' standard is the same as the 'good cause' standard discussed in *Kamakana*." Mtn. at 22. *Wong* does not discuss Rule 79-5(g) (or its predecessor 79-5(f)) at all, let alone stand for the proposition that maintaining the seal after ten years requires a lesser standard than that applied to sealing in the first instance.

speculation that witnesses for Proponents could be subjected to harassment.[15] All three fail.

(i) Judicial Integrity No Longer Compels Maintaining The Seal

Plaintiffs point to "judicial integrity" as requiring that the recording remain under seal, apparently indefinitely, (*see* Dkt. 892 at 17–20), but the reasoning that the Ninth Circuit found to maintain the seal in 2012 now cuts in Plaintiffs' favor. In holding that judicial integrity required maintaining the seal in 2012, the Ninth Circuit looked to two primary factors: (1) that Judge Walker had promised the tapes would not be released "at least for the foreseeable future"; and (2) that Proponents relied on an *expectation* that the tapes would not be released, at least for the foreseeable future. Both factors now favor lifting the seal.

First, as the Ninth Circuit's 2012 decision made clear, the "foreseeable future" timeline was tethered to the ten-year presumptive unsealing under Local Rule 79-5(g). *Perry*, 667 F.3d at 1084–85 & n.5. That "foreseeable future" is about to be in the past.

Second, in holding that "judicial integrity" required maintaining the seal in 2012, the Ninth Circuit relied heavily upon Proponents' expectations regarding the release of any tapes: "[t]he reason is that *Proponents reasonably relied on Chief Judge Walker's specific assurances*—compelled by the Supreme Court's just-issued opinion—that the recording would not be broadcast to the public, at least in the foreseeable future." *Perry*, 667 F.3d at 1084–85 (emphasis added). *In 2012*, Proponents' expectation that the tapes remain under seal might have counseled in favor of maintaining the seal. Now, however, that same consideration cuts the other way. As explained above, during oral argument before the Ninth Circuit, Proponents' counsel explicitly noted that its clients were aware of the ten-year presumptive unsealing rule and that his clients *were not* under the impression that the video recording of trial would necessarily be sealed forever. *Perry* oral argument at 7:04–7:48. Moreover, despite Proponents' "aware[ness]" of the local rules, they did not appeal from the order placing the video recording into the record under seal. *See Perry*, 667 F.3d at 1083 (Proponents "challenged neither

[15] Proponents do not argue that sealing should be continued because the sealed material is confidential or highly sensitive, nor can they. Unlike sealed business records that might contain nonpublic, competitively sensitive information, the sealed material here is a video recording of a trial that was held in open court and is recorded in publicly available transcripts. But even material that was once truly confidential is subject to presumptive unsealing after ten years under Local Rule 79.5.

the denial of their motion to compel the return of the copies nor the district court's entry of the recording in the record" in their appeal from the judgment).

Thus, the very consideration that led the Ninth Circuit in 2012 to conclude that the tapes should remain under seal—Proponents' expectations that the tapes would remain under seal for the "foreseeable future"—now favors lifting the seal. To the extent that Proponents offer a new, revisionist history of their expectations—*i.e.* that the tapes would remain under seal forever—such an argument has no support in the record.

Further, unsealing of the trial video ten years after the case is closed is not inconsistent with any "assurances" provided by Chief Judge Walker, given that any such assurance was by its nature tethered to the default rule that sealing ordinarily expires after ten years. Thus, there is no judicial integrity issue *at all* with unsealing the video at this time. The video has been maintained under seal for a decade, and at no point did Judge Walker "promise" that it would be sealed indefinitely.

(ii) Local Rule 77-3 Does Not Conflict With Lifting The Seal

Proponents next argue that a purported "conflict" between Local Rule 79-5(g) and Local Rule 77-3—which prohibits the public broadcast of court proceedings, except in circumstances not present here—requires maintaining the seal.[16] Dkt. 892 at 11–15, 22. Not so. Local Rule 77-3 is, quite simply, inapplicable to this situation. The *only* Local Rule that addresses whether an item placed in the record under seal may be released is Local Rule 79-5(g), and as this Court previously observed, "[n]othing in the Rules themselves creates an inherent conflict." 302 F. Supp. 3d at 1058; *see Qualls ex rel. Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 842 n.2 (9th Cir. 1994) ("District courts have broad discretion to interpret their local rules."); *United States v. Warren*, 601 F.2d 471, 474 (9th Cir. 1979) (district court's discretionary application of local rules only "rare[ly]" questioned).

Plaintiffs conflate the notions of unsealing a court record on the one hand and broadcast of a

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[16] Local Rule 77-3 currently provides, in relevant part:

> Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes or for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit or the Judicial Conference of the United States, the taking of photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited.

trial on the other, but they are different. This Court did not broadcast the trial. The only issue before the Court is whether to unseal the video. Once unsealed, the public can access the video and use it for any lawful purpose. While members *of the public* may choose to publish some or all of the trial video, for example as part of a documentary, so too could they use an unsealed document as part of such a broadcast. And members of the public can use it for other purposes as well, such as for their own personal review, as research for scholarly work, or as a visual aid in teaching about civil rights cases or the steps gay and lesbian individuals were required to take to achieve marriage equality in the United States.

(iii) Proponents' Amorphous, Unsupported, And Outdated Claims Of Fear Are Not Compelling Reasons To Maintain The Seal

Proponents' third and final reason for maintaining the seal—alleging some general harm that might befall their witnesses—likewise fails. Proponents offer no evidence that their witnesses, David Blankenhorn, Kenneth Miller, or William Tam, either fear for their safety as a result of the release of these tapes or are actually in any danger. If such evidence existed, Proponents could have submitted it in support of their motion. They did not. In fact, counsel for Plaintiffs asked counsel for Proponents for permission to reach out to those three witnesses to ask them if they had any such concerns. Proponents' counsel declined to grant permission, and without asserting that any particular witness expressed a fear, stated only that he "polled a critical mass of our clients and witnesses," none of whom supported unsealing. Dusseault Decl. ¶ 3. That Proponents have not only submitted no declarations from their own witnesses, and declined to agree to allow Plaintiffs' counsel to reach out to those witnesses, is telling.

Even during the height of the media coverage around Proposition 8 and the public debate raging around the same-sex marriage, Mr. Blankenhorn never expressed concern for his well-being. During argument before the Ninth Circuit in 2011, counsel for Proponents conceded that Mr. Blankenhorn was not worried about his safety: "Mr. Blankenhorn is a well-known advocate and expert in this area, and he has said candidly that he was not concerned about harassment of himself." (*Perry* oral argument at 10:00–10:10). Proponents are bound by this representation, *see Amberhill*, 814 F.2d at 1341, and even if they were not, they have submitted no evidence indicating that their earlier statements regarding

Mr. Blankenhorn are not as true today as they were in 2011. And in any event, Mr. Blankenhorn has since very publicly declared that "[w]hatever one's definition of marriage, legally recognizing gay and lesbian couples and their children is a victory for basic fairness." Dusseault Decl. Ex. 2.

Second, Proponents' other expert, Dr. Kenneth Miller, did not testify that gays and lesbians should not be able to marry. Instead, as counsel during argument before the Ninth Circuit confirmed, "He is a political scientist and his testimony was focused on the political power of gays and lesbians." *Perry* oral argument at 14:27–14:35. Because his testimony did not assert that gays and lesbians should not be allowed to marry, as Judge Reinhardt aptly put it: "It's not likely that he is going to be harassed or strung up" for his testimony. *Id.* at 14:32–14:36. Indeed, Proponents have put nothing in the record to suggest that Dr. Miller would fear for his safety or security as a result of the release of these tapes to the public.

Finally, there is no question that William Tam, one of the official proponents of Proposition 8, faced some harassment as a result of the extremely public position he took as a proponent of a ballot proposition designed to take away the right to marriage that same-sex couples had just been granted under the California Constitution. But Proponents have offered no *evidence*, not even a declaration by Dr. Tam, to suggest that the release of these tapes ten years after trial would lead to harassment, let alone cause him to fear for his safety. Proponents' argument is completely devoid of specifics, instead alleging generalized harassment of Proposition 8 supporters with a series of citations that are in some cases more than a decade old and in no event are more recent than 2013. *See* Dkt. 892 at 18–19 & n.3. That is insufficient. *Demaree v. Pederson*, 887 F.3d 870, 885 (9th Cir. 2018) (potential that records hypothetically "could be used for improper purposes" did not constitute a compelling reason to seal record).

It has been seven years since the Supreme Court issued its decision in *Hollingsworth v. Perry*, 570 U.S. 693 (2013), and five years since the Supreme Court finally settled the constitutionality of bans on same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The passage of time since the ultimate resolution of this issue has lessened, not increased, the passions on both sides of the issue—something that Proponents' counsel seemed to understand during argument in 2011:

> To the extent that the Court is suggesting that, well, the passage of time, passions have ebbed . . . . the harassment and violence and vandalism that we saw in 2008 has ebbed down. With respect to this litigation, *we would submit that the intensity of interest and the passions will only grow into a crescendo as this case reaches its final conclusion, wherever that may be.*

(*Perry* oral argument at 9:23–9:46 OA) (response to question from Judge Smith regarding the passage of time between the document incidents in 2008 and 2011) (emphasis added). That "final conclusion" was reached five years ago, and the accompanying crescendo has long since come and gone.

3. Local Rule 79-5's 10-Year Period Began To Run On August 12, 2010 When Judgment Was Entered

Proponents' assertion that this case was not closed until judgment was entered on August 27, 2012 ignores this Court's order two days later entering Judgment in this case "*nunc pro tunc* to August 12, 2010, the date on which the Court directed that judgment be entered 'forthwith.'" Dkt. 843 at 2.

On August 12, 2010, Chief Judge Walker ordered that judgment be entered in this case. Dkt. 727 at 10–11 ("The clerk is DIRECTED to enter judgment forthwith."). Unfortunately, as this Court later explained, "judgment in the case was not (apparently due to an oversight) entered in August 2010 as Judge Walker instructed." *Perry*, 302 F. Supp. 3d at 1057 n.20. On August 27, 2012, after realizing the clerical error, this Court entered judgment. Dkt. 842. Proponents reference that entry of judgment as the date from which Local Rule 79-5(g)'s ten-year presumptive unsealing should be calculated. *See* Dkt. 892 at 23–24. But, two days later, on August 29, 2012, this Court further corrected the record, directing that judgment in this case be entered "*nunc pro tunc* to August 12, 2010, the date on which the Court directed that judgment be entered 'forthwith.'" Dkt. 843 at 2 (Aug. 29, 2012). Because of that correction, not only was this case "functionally" closed as this Court previously noted, *Perry* 302 F. Supp. 3d at 1057 n.20, it was *actually* closed on August 12, 2010, and has been since this Court's order on August 29, 2012.[17]

B. The Right Of Public Access Requires Unsealing

Beyond this Court's local rules, two distinct rights of public access—one derived from federal common law and the other derived from the First Amendment—independently require unsealing.

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[17] If Proponents are concerned with an apparent clerical error, they may move to correct the error under Federal Rule of Civil Procedure 60(a).

First, the federal common law has long "recognize[d] a general right to inspect and copy . . . judicial records and documents." *Warner Commc'ns*, 435 U.S. at 597 (footnotes omitted). Courts "start with a strong presumption in favor of access to court records," *Foltz*, 331 F.3d at 1135, which allows "citizen[s] . . . to keep a watchful eye on the workings of public agencies," *Warner Commc'ns*, 435 U.S. at 598, and "promot[es] the public's understanding of the judicial process and of significant public events," *Valley Broadcasting*, 798 F.2d at 1294.

Second, the First Amendment right of access is even "stronger" than the common-law right of access. *United States v. Carpenter*, 923 F.3d 1172, 1179 (9th Cir. 2019). The First Amendment's "expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality op.). Indeed, "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open." *Id.* "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of *everyone* to attend trials so as to give meaning to those explicit guarantees." *Id.* (emphasis added).

This Court previously determined that both doctrines require the video recording to be unsealed, *See Perry*, 302 F. Supp. 3d at 1058, and Proponents' latest motion offers no reason for the Court to conclude otherwise now.

1. The Common-Law Right Of Public Access Requires Unsealing

As it did in its 2018 order, *see Perry*, 302 F. Supp. 3d at 1053, this Court should start with a strong presumption of public access, *see Foltz*, 331 F.3d at 1135. Although the presumption does not attach to certain categories of documents that "have traditionally been kept secret for important public policy reasons," *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989), the Ninth Circuit repeatedly has held that these categories are few and "narrow," *Kamakana*, 447 F.3d at 1178; *Carpenter*, 923 F.3d at 1178–79 (refusing to expand categories of documents immune from presumptive access). Proponents argue that the video recording here is "akin to private documents not traditionally exposed to the public," Dkt. 892 at 17 (citing *Perry*, 667 F.3d at 1087), but there is nothing private about witness testimony in a public trial. In fact, the Ninth Circuit has steadfastly recognized only "two categories of documents that fall in this category: grand jury transcripts and warrant materials

in the midst of a pre-indictment investigation." *Kamakana*, 447 F.3d at 1178.[18] The video recording at issue here is not remotely analogous to these types of records.

Proponents erroneously argue that Local Rule 77-3 "displace[s]" the common-law right to public access. Dkt. 892 at 12. As explained above, Local Rule 77-3 says nothing about sealing (or unsealing) court records and thus is irrelevant here. *See supra* p. 15. To be sure, Chief Judge Walker did not violate Local Rule 77-3, because he did not record the trial "for [the] purpose[]" of "public broadcasting or televising." Chief Judge Walker explained that the recording's "purpose" was that "it would be quite helpful to me in preparing the findings of fact." *Perry*, 667 F.3d at 1082. That is permissible use of a recording under Local Rule 77-3. Nor would this Court violate Local Rule 77-3 by lifting the seal, because by merely allowing the public to access the record in this case, the Court is not "broadcasting" or "televising" it. Rather, it is allowing the public to access a judicial record that Chief Judge Walker believed would be "quite helpful" in rendering his historic decision.

In any event, this Court properly interpreted its own local rules in finding that, whether or not Local Rule 77-3 prohibited the recording ten years ago, a recording *was made* and entered into the record without objection, and that any interpretation of Rule 77-3 in these unique circumstances should not conflict with the right of public access. *Perry*, 302 F. Supp. 3d at 1056. This interpretation is eminently reasonable because, wherever possible, the local rules should be read to comport with the Constitution. *See INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001). Proponents' reading of Local Rule 77-3 conflicts with the First Amendment's right to public access; this Court's reading furthers it.

Next, Proponents attempt to evade the common law right of access by invoking a "wholly derivative" theory that this Circuit does not follow. *See* Dkt. 892 at 15. Proponents rely on the Eighth Circuit's decision in *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996), which held that the video recording of President Clinton's deposition testimony was not a "judicial record" to which the common law presumption of public access attaches. But this case does not involve deposition testimony. And, in any event, the Ninth Circuit takes a different approach. *See Kamakana*, 447 F.3d

[18] The Ninth Circuit later confirmed that only those two categories are immune from presumptive access when it held that *post*-investigation warrant materials should presumptively be made public. *United States v. Bus. of Custer Battlefield Mus. & Store*, 658 F.3d 1188, 1192 (9th Cir. 2011).

at 1184; *Perry*, 302 F. Supp. 3d at 1056 (*McDougal* "dealt with a markedly different situation and applied a different standard").[19] The question in this Circuit is not whether the public has traditionally accessed a particular kind of document, but instead whether the document is one of a "very specific type[] of documents that warrant the highest protection." *Id.* at 1185. The recording here does not fall within the two narrow categories discussed in *Kamakana* (grand jury transcripts and pre-indictment warrant materials) that are not exempt from the common law presumption of public access.

Thus, Proponents can overcome the strong presumption of public access only if they establish sufficiently "compelling reasons" to maintain the seal. Ultimately, "the district court must weigh 'the interests advanced by the parties in the light of the public interest and the duty of the courts'" in deciding whether to release particular material. *Valley Broadcasting*, 798 F.2d at 1294 (quoting *Warner Commc'ns*, 435 U.S. at 602). This Court did just what *Valley Broadcasting* required it to do in weighing the competing interests to arrive at its conclusion that public disclosure is required. Specifically, this Court stated that it has "no doubt that the common-law right of access applies to the video recordings" and balanced that right against the "compelling justification of judicial integrity" that, in the Court's view, required honoring the terms that Chief Judge Walker set when he created the recording for his own use and then directed it to be filed in the record under seal. *Perry*, 302 F. Supp. 3d at 1055. That careful balance respected both Proponents' reliance on Judge Walker's promise and the public's right under federal common law and the First Amendment to, after the passage of 10 years, see for itself the historic Proposition 8 trial.

Plaintiffs have explained above why each of Proponents' other proffered reasons falls well short of a sufficiently "compelling" reason to maintain the seal under Local Rule 79-5. *See supra* pp. 14–15 (judicial integrity), 16–18 (potential harm to witnesses). For the same reasons, Proponents cannot

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[19] The Ninth Circuit has never cited *McDougal*, despite issuing many opinions on the right of access that postdate *McDougal*. And (other than this case) every district court order in this Circuit to cite *McDougal* concerned video recordings of depositions—a type of record not at issue here. *See, e.g.*, *Flake v. Arpaio*, 2016 WL 4095831 (D. Ariz. Aug. 2, 2016) (rejecting *McDougal* and denying motion for protective order preventing public release of deposition); *Apple iPod iTunes Antitrust Litig.*, 75 F. Supp. 3d 1271 (N.D. Cal. 2014); *Low v. Trump Univ., LLC*, 2016 WL 4098195 (S.D. Cal. Aug. 2, 2016). Moreover, *McDougal* split with the Second Circuit's correct refusal to "create an exception to the common law right to inspect and copy judicial records for videotaped depositions." *Application of CBS, Inc.*, 828 F.2d 958, 959–60 (2d Cir. 1987).

overcome the common-law presumption of public access to the video recording of this historic trial.

2. The First Amendment Right Of Public Access Requires Unsealing

The related doctrine of public access under the First Amendment "flows from an 'unbroken, uncontradicted history' rooted in the common law notion that 'justice must satisfy the appearance of justice.'" *Courthouse News Serv. v. Planet*, 947 F.3d 581, 589 (9th Cir. 2020) (quoting *Richmond Papers*, 448 U.S. at 573–74 (plurality op.)). The Supreme Court has confirmed "[i]n a variety of contexts" that the First Amendment implicitly guarantees the "right to 'receive information and ideas.'" *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Richmond Newspapers*, 448 U.S. at 576. "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263 (1941).

"Under the First Amendment," therefore, "the press and the public have a presumed right of access to court proceedings and documents." *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (citing *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). Because "it is difficult for [people] to accept what they are prohibited from observing," *Richmond Newspapers*, 448 U.S. at 572 (plurality op.), the First Amendment guarantees free and open access to judicial proceedings to promote public confidence in the judicial system. Indeed, witnessing a trial "affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." *Id.* (citation omitted); *see also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1181 (6th Cir. 1983) ("The public has an interest in ascertaining what evidence and records the District Court . . . relied upon in reaching [its] decisions.").

"[T]he federal courts of appeals widely agree" that "the First Amendment right of access to information reaches civil judicial proceedings and records," just as it does criminal proceedings. *Courthouse News*, 947 F.3d at 590; *see also Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 860 F.3d 1244, 1260 (9th Cir. 2017) (treating the First Amendment and common law rights of public access to court documents in a civil case as coextensive with those of a criminal case). Thus,

in determining whether to maintain the seal in the face of the First Amendment, the Court must "consider whether (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Perry*, 667 F.3d at 1088.

For the reasons discussed above, Proponents have not shown that maintaining the seal ten years after trial would serve a compelling interest. Nor would judicial integrity be harmed by lifting the seal in accordance with this Court's local rules, which Proponents have conceded they were aware of. *Perry* oral argument at 7:04–7:48. Nor would a finding that the First Amendment applies to these unique circumstances be "startling" or "imply that the longstanding bar on the public broadcast of trial proceedings is unconstitutional." Dkt. 892 at 24. By unsealing the recording, the Court is not publicly broadcasting the trial. It is providing the public access to judicial material—entered into the record without specific objection—that aided Chief Judge Walker in rendering his historic decision. There could be no better "form of legal education." *Richmond Newspapers*, 448 U.S. at 572 (plurality op.).

C. In The Alternative, And At Minimum, The Court Should Unseal The Video Recording Of The Testimony Of Plaintiffs' Witnesses

Even if the Court disagrees that the local rules, federal common law, and First Amendment require unsealing the video records of the entire trial, Plaintiffs alternatively request that, at a minimum, the Court unseal those portions of the trial testimony from Plaintiffs' witnesses. Doing so would comport with the Ninth Circuit's requirement that courts consider "alternatives to closure that would adequately protect [any] compelling interest" that requires at least some sealing, *Perry*, 667 F.3d at 1088, as well as this Court's requirement that requests to seal material in civil cases be "narrowly tailored to seek sealing only of sealable material," Local Rule 79-5(b).

Under these principles, this Court frequently has denied requests for wholesale sealing where more narrowly tailored sealing can be accomplished. *See, e.g.*, *Karasek v. Regents of the Univ. of Cal.*, 2016 WL 4036104, at *17 n.8 (N.D. Cal. July 28, 2016) (denying "vastly overbroad" sealing requests and requiring "narrowing"); *Finjan, Inc. v. Blue Coat Sys., Inc.*, 2015 WL 13389611, at *1 (N.D. Cal. Apr. 17, 2015) (denying in part motion to seal "with leave to propose sealing that is more narrowly tailored to only the sealable material"); *CreAgri, Inc. v. Pinnaclife Inc.*, 2014 WL 27028, at *2 (N.D.

Cal. Jan. 2, 2014) ("[T]he Court told the parties that the sealing requests were too broad and should be narrowed."); *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, 2014 WL 12647906, at *2 (N.D. Cal. Sept. 18, 2014) (refusing to seal deposition transcripts because the request to seal was "not narrowly tailored").

Here, Proponents' argument against unsealing stems from harm that purportedly would flow to "their witnesses" and "Proposition 8 supporters." *See, e.g.*, Dkt. 892 at 18. Proponents have never argued that witnesses who supported *Plaintiffs* would suffer similar harm from unsealing, and in fact 15 of Plaintiffs' and Plaintiff-Intervenor's witnesses have submitted a declaration stating that they support unsealing—comprising approximately 43 of the 65 total hours of witness testimony. Thus, none of Proponents' rationales for continuing the seal apply to Plaintiffs' witnesses' testimony. They do not explain, for example, how public access to the video recording of the four named Plaintiffs testifying about their love for their partners would in any way harm anyone. Nor do they explain how public access to the testimony of experts who write and speak regularly on the subjects to which they testified, and who themselves support unsealing, will cause any harm. Therefore, if the Court is not inclined to unseal the entire video, it should at the very least unseal the testimony, whether given on direct or cross-examination, of any witness called by Plaintiffs, as well as any lawyer argument.

CONCLUSION

This Court's local rules, federal common law, and the First Amendment all require the same conclusion: The time has come for the public to have access to judicial records that helped the trial judge rule in one of the most consequential trials of our generation. Proponents provide no reason at all—let alone "compelling" reason—to find otherwise. The Court should deny Proponents' motion to continue the seal.

Dated: May 13, 2020

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: */s/ Theodore B. Olson*
Theodore B. Olson

Attorneys for Plaintiffs

PROOF OF SERVICE

I, Laura Rocha-Maez, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071, in said County and State. On May 13, 2020, I served the following document(s):

PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

On the parties stated below, by the following means of service:

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☑ **BY ELECTRONIC TRANSFER TO THE CM/ECF SYSTEM**: On this date, I electronically uploaded a true and correct copy in Adobe "pdf" format of the above-listed document(s) to the United States District Court's Case Management and Electronic Case Filing (CM/ECF) system. After the electronic filing of a document, service is deemed complete upon receipt of the Notice of Electronic Filing ("NEF") by the registered CM/ECF users.

☑ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2020

/s/ Laura Rocha-Maez
Laura Rocha-Maez

EXHIBIT A

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Attorneys for Plaintiffs
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Paul T. Katami, and Jeffrey J. Zarrillo

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF CHRISTOPHER D. DUSSEAULT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Christopher D. Dusseault, declare as follows:

1. I am an attorney licensed to practice law in the State of California and in the United States District Court for the Northern District of California. I am a partner at the law firm of Gibson, Dunn & Crutcher LLP, counsel of record for Plaintiffs Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo ("Plaintiffs"). I make this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would competently testify hereto.

2. On April 24, 2020, and again on April 28, 2020, I emailed Charles J. Cooper, counsel for Proponents, requesting a call to discuss Proponents' motion. Mr. Cooper and I had a phone conversation on April 28, 2020. During that conversation, I requested that Proponents agree that counsel for Plaintiffs could contact David Blankenhorn and Kenneth Miller, the two expert witnesses Proponents called during the trial, as well as William Tam, the one Proponent who testified as a witness at trial, to ask them whether they had any concerns over unsealing the video recording of the trial and whether they would be willing to submit declarations in support of unsealing. I informed Mr. Cooper that I understood he would likely need to discuss our request with his clients, and he agreed to get back to me.

3. On May 1, 2020, I received an email from Mr. Cooper, stating that "we have now polled a critical mass of our clients and witnesses," and that "no one supports a breach of the promise of confidentiality made by the trial court." Mr. Cooper further stated "[c]onsequently, there appears to be no need for you to reach out to them, and we would prefer that you not do so." Mr. Cooper's response did not indicate whether he or his team had in fact spoken with each of the three witnesses I mentioned in our call, nor did it state that each witness actually opposed lifting the seal. Because each witness was either a Proponent or called by Proponents as an expert at trial, and because Proponents did not agree that Plaintiffs' counsel could contact them, we did not do so. Proponents did not submit declarations from any of these three witnesses in support of the current motion.

4. Attached hereto as **Exhibit 1** is a true and correct copy of the emails exchanged between Proponents' counsel and myself referenced above.

5. Attached hereto as **Exhibit 2** is a true and correct copy of the article "How My View on Gay Marriage Changed," N.Y. TIMES (June 22, 2012), by David Blankenhorn. This article is also available at https://nyti.ms/2WghyuX.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on this 11th day of May 2020, at Los Angeles, California.

Christopher D. Dusseault

EXHIBIT 1

From: Chuck Cooper <ccooper@cooperkirk.com>
Date: May 1, 2020 at 6:44:46 AM PDT
To: "Dusseault, Christopher D." <CDusseault@gibsondunn.com>
Cc: David Thompson <dthompson@cooperkirk.com>
Subject: RE: Question re Motion to Maintain Sealing of Trial Video

[External Email]
Chris,
Pursuant to our call earlier this week, we have now polled a critical mass of our clients and witnesses, and no one supports a breach of the promise of confidentiality made by the trial court. Consequently, there appears to be no need for you to reach out to them, and we would prefer that you not do so. Again, I appreciate your reaching out and running this by me.
All best,
Chuck

Charles J. Cooper
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From: Dusseault, Christopher D. <CDusseault@gibsondunn.com>
Sent: Tuesday, April 28, 2020 2:00 PM
To: Chuck Cooper <ccooper@cooperkirk.com>
Subject: RE: Question re Motion to Maintain Sealing of Trial Video

Chuck, just following up. Is there a time we can talk? Also, if someone else on your team is the better point of contact I can talk to them instead. My cell is 213.675.7054. Best, Chris.

Christopher D. Dusseault

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From: Dusseault, Christopher D.
Sent: Friday, April 24, 2020 6:55 AM
To: 'ccooper@cooperkirk.com' <ccooper@cooperkirk.com>
Subject: Question re Motion to Maintain Sealing of Trial Video

Chuck, I hope that you are doing well in these unusual times. I have a question I would like to run by you in connection with the Proponents' motion referenced above. Can you let me know a good time to talk and the best number at which to reach you? I am available until noon Eastern today, after 6:00 Eastern today, or over the weekend. If you would prefer to call me directly, my cell number is 213.675.7054. Best, Chris.

Christopher D. Dusseault

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EXHIBIT 2

The New York Times | https://nyti.ms/PHXIzA

OP-ED CONTRIBUTOR

How My View on Gay Marriage Changed

By David Blankenhorn

June 22, 2012

IN my 2007 book, "The Future of Marriage," and in my 2010 court testimony concerning Proposition 8, the California ballot initiative that defined marriage as between a man and a woman, I took a stand against gay marriage. But as a marriage advocate, the time has come for me to accept gay marriage and emphasize the good that it can do. I'd like to explain why.

I opposed gay marriage believing that children have the right, insofar as society makes it possible, to know and to be cared for by the two parents who brought them into this world. I didn't just dream up this notion: the United Nations Convention on the Rights of the Child, which came into force in 1990, guarantees children this right.

Marriage is how society recognizes and protects this right. Marriage is the planet's only institution whose core purpose is to unite the biological, social and legal components of parenthood into one lasting bond. Marriage says to a child: The man and the woman whose sexual union made you will also be there to love and raise you. In this sense, marriage is a gift that society bestows on its children.

At the level of first principles, gay marriage effaces that gift. No same-sex couple, married or not, can ever under any circumstances combine biological, social and legal parenthood into one bond. For this and other reasons, gay marriage has become a significant contributor to marriage's continuing deinstitutionalization, by which I mean marriage's steady transformation in both law and custom from a structured institution with clear public purposes to the state's licensing of private relationships that are privately defined.

I have written these things in my book and said them in my testimony, and I believe them today. I am not recanting any of it.

But there are more good things under heaven than these beliefs. For me, the most important is the equal dignity of homosexual love. I don't believe that opposite-sex and same-sex relationships are the same, but I do believe, with growing numbers of Americans, that the time for denigrating or stigmatizing same-sex relationships is over. Whatever one's definition of marriage, legally recognizing gay and lesbian couples and their children is a victory for basic fairness.

Another good thing is comity. Surely we must live together with some degree of mutual acceptance, even if doing so involves compromise. Sticking to one's position no matter what can be a virtue. But bending the knee a bit, in the name of comity, is not always the same as weakness. As I look at what our society needs most today, I have no stomach for what we often too glibly call "culture wars." Especially on this issue, I'm more interested in conciliation than in further fighting.

A third good thing is respect for an emerging consensus. The population as a whole remains deeply divided, but most of our national elites, as well as most younger Americans, favor gay marriage. This emerging consensus may be wrong on the merits. But surely it matters.

I had hoped that the gay marriage debate would be mostly about marriage's relationship to parenthood. But it hasn't been. Or perhaps it's fairer to say that I and others have made that argument, and that we have largely failed to persuade. In the mind of today's public, gay marriage is almost entirely about accepting lesbians and gay men as equal citizens. And to my deep regret, much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus. To me, a Southerner by birth whose formative moral experience was the civil rights movement, this fact is profoundly disturbing.

I had also hoped that debating gay marriage might help to lead heterosexual America to a broader and more positive recommitment to marriage as an institution. But it hasn't happened. With each passing year, we see higher and higher levels of unwed childbearing, nonmarital cohabitation and family fragmentation among heterosexuals. Perhaps some of this can be attributed to the reconceptualization of marriage as a private ordering that is so central to the idea of gay marriage. But either way, if fighting gay marriage was going to help marriage over all, I think we'd have seen some signs of it by now.

So my intention is to try something new. Instead of fighting gay marriage, I'd like to help build new coalitions bringing together gays who want to strengthen marriage with straight people who want to do the same. For example, once we accept gay marriage, might we also agree that marrying before having children is a vital cultural value that all of us should do more to embrace? Can we agree that, for all lovers who want their love to last, marriage is preferable to cohabitation? Can we discuss whether both gays and straight people should think twice before denying children born through artificial reproductive technology the right to know and be known by their biological parents?

Will this strategy work? I don't know. But I hope to find out.

EXHIBIT B

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF KRISTIN M. PERRY IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Kristin M. Perry, state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I was one of the four plaintiffs who brought this lawsuit. I agreed to become a plaintiff because I love Sandy Stier ("Sandy"), and I wanted our relationship to be recognized in the same way that all of my heterosexual friends had their relationships recognized—through marriage. Sandy and I had committed to support and protect each other in every way we could outside of marriage, through multiple legal agreements such as domestic partnership, estate plans, and home ownership—but none of these had the power and meaning of marriage. We also committed to each other and supported each other through the blending of our families. Marriage was the next logical step, and we wanted to make that permanent commitment in a way that didn't make us feel like second class citizens. We wanted to be married so we could hold ourselves out to the world in the same way as our heterosexual friends do, so that everyone would know how we felt about each other. I wanted Sandy to be my wife.

3. As a plaintiff in this case I attended all but one day of trial and testified on the first day. I spent countless hours preparing for trial with the legal team. I learned that the legal process is complex and challenging, in part due to its high standards for proof and involvement of real people who have suffered specific harm. Being a plaintiff in a lawsuit is different than anything I had ever done before, or that I have done since. The structure of a legal case creates a very high bar to ensure that you support your facts with evidence and that you are honest and accurate. In a trial, and in deposition, there is also the rigor of cross examination, and I don't think the public fully understands how a trial works if they don't see it for themselves.

4. Now that the experience is over, I know that it was an honor and a privilege to be part of this case. But before I testified, I was very worried. Giving testimony on the stand, I felt like I was exposing myself and the most painful, humiliating, and intimate details of my life to a room full of people I didn't know. I was doing that under oath, and I was doing that knowing that the other side was listening to everything I was saying and was preparing to challenge anything I said that they didn't agree with. I have never been in a situation like that before, and I have never been in a situation like

that since. I was very nervous to be so vulnerable, but I knew that this is what needed to happen so I could offer proof of the importance of securing my right to marry Sandy. You will see through my testimony that I willed myself to speak very personally about my hope to one day marry the woman I love, which I hoped would also highlight the universal themes of love and equality, and I think you will see how embarrassing it was to have to sit in front of my family and friends and describe all of the ways in which access to those universal dreams was not available to me in the same way that it was for others. For me, when I gave my testimony, that is when it came into sharp focus, that these themes are universal, but I had not been treated the same way as everyone else.

5. When I learned back in 2017 that an organization was seeking to unseal the tapes, I was delighted. I had been hoping the tapes would be released, because I think it is so important on so many levels for them to be publicly available. Although the tapes were not released back in 2017, I remain hopeful that the time for their release has finally come. Even though it has been ten years since the trial took place, people are still debating this issue, there are still discriminatory laws being proposed, and there are even still discriminatory laws on the books that affect the rights of LGBT people to be in a relationship with the person they love and not have to choose that over employment or housing. While progress has been made in securing rights for LGBT individuals, the fight for civil rights is never over. There could be another new referendum affecting the rights of LGBT people any day, and it is important to remind people about what it was like before marriage equality was guaranteed under the law. The testimony in our case speaks to these issues, and will be a perpetual reminder to people of the way things once were.

6. I think this generation of politicians, community leaders, and lawmakers should see the tapes, so they can see the pain and suffering they inflict when unjust laws are put on the books. In our current political and social climate, we see people yelling at and dehumanizing each other every day. In such circumstances, it is extremely important that people be able to see the actual faces and to hear the actual voices and words of human beings who have experienced the harm discriminatory laws cause the LGBT community, and have testified about them and been cross-examined about them. I believe that if people could only see how discriminatory laws and actions affect real people, it would lead them to empathize with us and even change their minds. For those that did not have a front row seat to this

trial, video footage is the closest they will be able to get to experiencing our testimony and, hopefully, being impacted and changed by it. Reading a transcript of trial testimony—which I have done—just can't come close to the actual experience of watching a person testify and be questioned about these critical issues. Allowing this video to be released would enable it to live on in perpetuity and to have an effect on generations to come.

7. I also think this trial was a watershed moment not just in LGBT history, but in American history as a whole, and the video of the trial is a historically significant record of that moment. For that reason, I think that the tapes will be an instructive piece of history for school children, many of whom are starting to not remember a time before their moms and dads could get married. It will also be instructive in government, politics, and law school classes about civil rights. The ability of students of all ages to watch the video of the trial could have a remarkable impact on their education and understanding. There is no reason why the video footage of my, Sandy's, and others' testimony should be hidden from view, when it is the best record of what happened in that courtroom.

8. Seeing a video of the trial is very different than hearing me speak publicly after the fact about my experience, or reading the trial transcript. There is something different about seeing someone being put under oath, being subjected to cross examination, and seeing and hearing them speak their own truth in their own voice. You will see that in my face in the trial video in a way that cannot be conveyed by words on a page. The video shows how terrified I was, how personal this was for me, and how I felt like I was carrying the weight of not only my family but the lesbian and gay community as well. You will see on my face that and I did not want to let them down and felt the pressure of that with every word I said.

9. Since the trial, Sandy and I wrote a book, which was published in 2018, that describes our experience as plaintiffs in this case. Many people who have read our book have told us how impactful it was to read about our experiences during the trial. There is no question in my mind that it would be far more impactful for them to be able to watch the unedited, live version of the trial. In writing our book, we got to craft the narrative and edit the book so that it came out the way we wanted it to. But there is no opportunity like that in court; you are subject to someone else's line of questions and narrative. I know what I said at trial was authentic and honest, and I am certain that someone

watching the trial video will be able to see that as well. They will see me as my true self in a very unique and stressful situation, and that is something that you cannot capture by reading a trial transcript or even by reading our book. Although I have been targeted and harassed in the past, simply because I am a lesbian, I am not concerned that the release of the trial tapes of my testimony would lead to more or worse harassment.

10. Not only do I think it is important for my trial testimony to be made public, I think all of the footage of the trial should be made public. I learned so much during the trial. There were many great experts that are at the top of their field in issues that relate to marriage equality and the experience of the LGBT community. But perhaps even more important than those expert witnesses were the other witnesses that spoke about their experiences dealing with Proposition 8 or living as a lesbian or gay person. I was particularly moved by Ryan Kendall and his story about how he was sent to conversion therapy when his parents learned he was gay. Reading the words that he said from a transcript is not the same as seeing this brave young man tell his truly horrific story, in front of a court and under oath. There were tears and emotion during his testimony, and that will come through only in the trial video. Reading witness testimony that describes contemplating suicide after years of abuse by parents or therapists is not the same. This testimony can only be fully appreciated through viewing the video. The same is true about the testimony of Helen Zia who was married during the brief period before Proposition 8 was passed when marriages were permitted, or the testimony of Republican former mayor of San Diego Jerry Sanders, who talked about his experience of deciding to oppose a local ordinance after learning that his daughter is lesbian. The emotion in the courtroom during the testimony of those witnesses was palpable, and the world needs to be able to see and feel that, and the only way that can happen is if the trial tapes are released and people see the videos.

11. My participation in the trial challenging Proposition 8 is something I will never forget. It has been over ten years since I sat through the trial and testified at the trial. To this day, I continue to be empowered by my experience during the trial, and by having the Court recognize that my rights and dreams deserve equal recognition as everyone else's. If the tapes remain hidden from public view, to me it would feel like a very important part of my history, and the history of the LGBT community as a whole, was being suppressed.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 1st day of May 2020, at Berkeley, California.

Kristin M. Perry

Kristin M. Perry

EXHIBIT C

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF SANDRA B. STIER IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Sandra B. Stier, state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I was one of the four plaintiffs who brought this lawsuit in 2009. I agreed to become a plaintiff because I knew I wanted to get married to Kristin Perry ("Kris") in our home state of California. I felt like bringing this lawsuit was the only way that was ever going to happen. I knew that being a plaintiff in this lawsuit would take personal commitment and strength, and that Kris and I could give the case the attention and commitment it deserved and required.

3. I was right that being a plaintiff in this case would be a significant commitment. More than just a time commitment, it was a very personal commitment for me, demanding tremendous strength and emotional energy. As a plaintiff in this case I was deposed, which was an intimidating and stressful experience. That was especially true in our case where we were being asked deeply personal questions about our very identity. The questions were very invasive, and often, inappropriate.

4. Testifying at the trial of this case was also a unique and terrifying experience. After my deposition, I assumed that the other side would ask me many of the same invasive questions that they asked during my deposition, but in open court. Fortunately, I was not cross-examined, but the experience was still jarring; giving my testimony in federal court, under oath, and in front of a judge was different than anything I have done before or since.

5. I attended every day of the trial in this case and was, therefore, able to hear the testimony of each witness, and the arguments made by counsel. Being in court every day was fascinating, and I am grateful to have seen and heard every word. Day by day, I watched as expert witnesses who were there giving testimony on my behalf brought forth their research that clearly debunked the opposing side's arguments. From economics, to political power, to emotional stability and physical health, the expert witnesses proved that discrimination hurts individuals and families in a powerful and life-altering way. Seeing it in person was gripping, and there is no better way to understand what happened in that trial than by watching the trial video. Transcripts do not do it justice because they cannot relay the emotional tenor that was so present in every day of the trial. Being able to see the faces and hear

the voices of the witnesses made the arguments—and the trial as a whole—make sense in a way that just reading the transcripts does not.

6. When I learned back in 2017 that a motion had been filed to unseal the trial video, I was thrilled. Although that action did not result in the video being immediately released, I am hopeful that the time has finally come for these tapes to be made available to all. From the very beginning of the trial, I thought it was important that everyone—the public, other people that might try to sponsor a ballot initiative like Proposition 8, and other courts—could not just read, but also hear and see, the actual trial testimony. I thought the video of the trial was particularly important, because the Supreme Court did not really get to consider the merits of our case. And the merits are important, our case had witnesses and testimony and a trial in a way that no other marriage equality case that I know of has before or since.

7. Regarding my testimony in particular, I think it is important that the video of my testimony is released because I believe the video will show—in a way that the transcript cannot—the real reasons that marriage is important to people like me and Kris. I think our testimony captured the voice and the emotions of so many other gay couples that were not actual plaintiffs in this lawsuit, but who we felt that we were representing.

8. One other thing that is important and different about my trial testimony from other times when I tell my story, or when my story is told, is that during my trial testimony, the Judge had the opportunity to ask me questions. When you see the video, you will see in my face how jarring an experience that is, when a federal judge turns to you and asks personal questions, questions that you didn't expect and didn't know were coming. This is unique to those videos; you can't see that in any reenactment or get that perspective from a written trial transcript.

9. Not only do I think it is important for my trial testimony to be made public, I think all of the footage of the trial should be made public. I am one of the few people who had the pleasure and honor of sitting through the entire trial, and I learned so much. This footage has a powerful future in the education system. What better way to teach our youth about how constitutional rights are protected than providing them a front row seat to a historic trial? After the trial, Kris and I spoke to many young people in high schools and colleges across the country and they were hungry to learn more about our

case, the arguments and the legal process. They deserve to see the case in action, and the tapes are critical to delivering this.

10. I think these young people—and the world in general—should be able to see the testimony of Gary Segura talking about the political powerlessness of the LGBT community. He gave some shocking examples of just how disadvantaged LGBT people have been historically, and the devastating impact of that harm. I think it is very important for everyone to be able to hear about this history, and reading about it is not the same. During trial, Dr. Segura, like me, was under oath. He was also cross-examined, and the videos are important so people can see how he reacted to the questions from the other side, and they will be able to see that his responses were based on actual peer-reviewed research and facts. The same is true about the testimony of Nancy Cott. She told the story of how after African Americans were freed from slavery, one of the first things they did was rush to get married, because marriage was a symbol of personhood and citizenship. The expert testimony of these two academic witnesses, as well as others, provided the court with the research and factual explanation of how discrimination impacts individuals and families economically, politically, socially, physically, and emotionally. I believe that it can and would do the same thing for educators, students, and the public at large.

11. Since the conclusion of our case, I have long thought about the risk that Kris and I took with our involvement, reflecting on hateful phone calls and social media posts we received from strangers during and even years after the trial. We took the risk because we believed in what we were doing, and by doing so, pushed ourselves well beyond our comfort zone. The people who do not want these tapes released simply do not support exposing the truth. The truth about how they presented their arguments, and what they believe. They don't want the public to see how their arguments were shattered by the facts as presented by the expert witnesses on the stand, how time and again they revealed the fact that there was no logic or reason or heart behind the positions and arguments that they were making in court. I am certain that no one took more risk during the case than the plaintiffs, including me. Despite that risk, I am not concerned that I will be targeted or harassed if the trial recordings of my testimony are released.

12. As a plaintiff in this lawsuit, I exposed the most personal parts of my life; I made myself vulnerable and was willing to publicly tell my story, under oath, because I wanted to marry the person I love, and I wanted that same right to be extended to all Americans. It has now been over ten years since I gave that testimony. I think the public has a right to see the trial videos, and I hope this court allows them to be released.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 4 day of May 2020, at Berkeley, California.

Sandra B. Stier

Sandra B. Stier

EXHIBIT D

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF JEFFREY B. ZARRILLO IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Jeffrey B. Zarrillo, state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I was one of the four plaintiffs who brought this lawsuit. I agreed to become a plaintiff because I love Paul Katami ("Paul"), and I knew I wanted to marry him and didn't see any other way that was going to happen after Proposition 8 passed unless someone took action. Marriage has always been important for me, and it was always something I knew I wanted to do, so I decided to become a plaintiff to fight for my right to marry Paul.

3. Being involved in a lawsuit is not something I ever thought I would do, and it is unlike anything I have ever done before or since. As a plaintiff in this case I had to learn so much about the legal process. I also had to share very personal aspects of my life very publicly. I was deposed and asked questions about my personal life. I felt like I had to defend the very nature of who I am and to explain and defend why I love Paul and how I love him. Every part of that experience was invasive and difficult.

4. I attended every day of the trial in this case, and was, therefore, able to hear the testimony of each witness, and the arguments made by counsel. I also testified during trial, explaining how harmful and personally hurtful the Proposition 8 campaign was for me. In particular, I testified about how I found the way the campaign in favor of Proposition 8 was framed as necessary to protect the children to be personally offensive. I love kids and always wanted to have kids, and I would never hurt anyone, especially a child. The idea that being gay somehow made me dangerous to children was extremely upsetting. I think my statements and emotion during trial show just how harmful the Proposition 8 campaign was to people like me and Paul.

5. When I learned back in 2017 that an organization had filed a motion to unseal the trial videotapes, I was excited. Three years later, I am even more excited that the day for the release of these tapes may have finally come. It was very hard for me to testify, and it was scary to do it, but that is why it is so important that these tapes are shared with the public. Reading a transcript is different than seeing a human being pour his heart out while under oath, and that is what I did. Although I was

very vulnerable while testifying, I want the world to see those tapes. I want anyone who considers supporting something that might take away my rights to see me and Paul, and the other plaintiffs Kris Perry and Sandy Stier, describe the impact that Proposition 8 had on us. To understand the impact that Proposition 8 had, reading the words of a trial transcript is not enough. You need to hear our voices and see our faces as we tell our story under oath.

6. Telling my story under oath in a federal courtroom was so different than telling my story any other way. I think people have the right to see that, they have the right to be transported to the courtroom and see what the trial was really like. People should be able to see what I experienced, where I had to literally testify and prove that I love Paul in a way that no opposite sex couple would ever have to do. The trial transcripts cannot convey what that was like, only seeing the testimony, via the tapes, can communicate what I was experiencing to the public.

7. I especially think it is important for young people who are gay to be able to see the trial video. Although LGBT rights have improved over the past ten years since the trial took place, there are still discriminatory laws in place, and people of all ages still face stigma and discrimination for being gay. I think that if young kids could see the plaintiffs fighting so strongly for their rights, despite how difficult and emotional it was for us to do so, they would be inspired to live their lives the way that they want to and to take up the fight against the discrimination that still exists.

8. I understand that Proponents have raised concerns regarding how witnesses might be treated if the video recording of the trial is made public. I am not worried about any adverse treatment, such as being targeted or harassed, as a result of the video recording is made public. If I was going to be harassed because I was a gay man, or because of my public participation in this trial, it has happened already, and nothing about the release of the tapes would change that treatment.

9. Not only do I think it is important for my trial testimony to be made public, I think all of the footage of the trial should be made public. Only a few people, including me, got to see the entire trial, and there was so much there to learn and see. The trial has been written about and there are trial transcripts, but unless you see the video, you cannot assess for yourself the truthfulness of each witness.

10. I think people should be able to hear and see the testimony of the expert witnesses, who were the best in their fields, and who I felt did a fantastic job of articulating in an understandable and

relatable way what discrimination is and how it affected my life and the lives of others in the LGBT community. I found Dr. Gary Segura's testimony, in which he talked about the political powerlessness of the LGBT community, to be particularly powerful. But I was impacted by and learned from all of our expert witnesses. People deserve to see the poise with which the experts on our side handled questions from the opposing attorneys and the conviction of their responses. That is something you cannot get from a transcript. Likewise, I think it is important for the public to see the testimony from the other side's experts. The public, lawmakers, everyone should be able to see and hear those arguments. Otherwise, I believe we will be losing an important piece of the history of the LGBT community and the fight for LGBT rights.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 4th day of May 2020, at Burbank, CA.

Jeffrey B. Zarrillo

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Paul T. Katami, and Jeffrey J. Zarrillo

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF PAUL KATAMI IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Paul Katami, state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I was one of the four plaintiffs who brought this lawsuit. I agreed to become a plaintiff because I think that everyone should be treated equally, regardless of their sexual orientation. I wasn't being treated equally because I couldn't marry the person I love, Jeff Zarrillo ("Jeff"). I didn't want to have to be part of a lawsuit, but I didn't see any other way for me to possibly get the right to marry Jeff.

3. Being a plaintiff in this lawsuit was such a unique and intense experience. I didn't know much about what a lawsuit was before getting involved. I had never even been to court before, so I had to learn from the very beginning the significance of everything that was happening. I think most people don't have any idea what a lawsuit really entails. I had to talk to a lot of lawyers, and I had to even talk to experts. But one of the most significant things for me was being deposed. I was asked, under oath, by the other side, about the most intimate details of my life, my sex life, and my commitment and desire to be with Jeff. In a way, it was humiliating to have my love and my very life questioned like that. If you haven't been deposed, it is very difficult to explain just what that feels like. I also attended almost every day of the trial in this case, and was therefore able to hear the testimony of each witness, and the arguments made by counsel. And I testified during trial myself.

4. Testifying in a federal court, where I spoke publicly about the most intimate details of my personal life, was the most nerve wracking experience of my life. I felt like every word I said could have real and major consequences, and that is because each word did. As I told my story, I was also very aware that the other side was listening to my every word and waiting for me to misstep. I knew that they disagreed with what I was saying and were looking for an opportunity to discredit me. I had also never spoken before a judge, which was new and terrifying.

5. When I learned back in 2017 that an organization had filed a motion to unseal these tapes, I thought it was about time. Three years later, I am even more hopeful that the time for their release has come. Even though the case was very personal, and I had to be very vulnerable during the

case and during trial, I know there is real value for the public to see the trial tapes. I want the tape of my testimony to be made public, and I want the entire trial video to be made public. I think there is a unique value to seeing and hearing the tapes that cannot be communicated just by reading a trial transcript or seeing a reenactment of the trial. It just isn't the same.

6. I want the public to see and hear my trial testimony. When they see the video, they will be able to judge for themselves my commitment to Jeff, and the way in which Proposition 8 was personally offensive. If you see the trial tape, you will be able to see the tears in my eyes, and you will hear the way my voice quivers when I talk about what Jeff means to me. You will also see someone that is taking their case to a court, and is willing to put themselves in this very uncomfortable position for the sake of equality for everyone in the gay community.

7. I also think it is really important for the public to see how I was cross examined by the other side during my trial testimony. This is such a unique part of a trial, the fact that you know there is an opposing side that is going to ask you questions and going to challenge you. I was the only plaintiff who was cross examined. I think in the trial tapes people will be able to see the conviction I had in my statements, and they will be able to judge for themselves whether the questions the other side asked were justified or appropriate. You cannot recreate what it feels like to be cross examined. The only way to see that and experience that is through the trial tapes, as no reenactment or reading of the trial transcripts can do that experience justice. I think the public has the right to be transported into the courtroom to share and see that experience. Our case was the only marriage equality case where testimony like ours was offered. And even though marriage equality is currently the law of the land, there are efforts around the country to roll back the rights of gay people like me and Jeff. The tapes of our trial are so important because there are people out there who have never seen something like this, and seeing Jeff and I, and the other Plaintiffs, Kris Perry and Sandy Stier, talk about our relationships can humanize this issue, and gay people, for someone who doesn't have exposure to relationships like ours. I think seeing the videos will communicate how harrowing it is to be someone whose liberties and rights are under attack and are at stake. I think seeing this will provide a different and unique perspective to anyone who is considering any measure or law that would take rights away from gay people.

8. What you didn't see in the trial reenactments, and what you can't appreciate by reading a trial transcript, is the raw emotion and tears, and the feeling of being under attack. We were fighting against the idea that somehow Jeff and I were a threat to children, which was a main theme of the campaign, and something that really hurt. On the trial tapes, you will see in my face and hear in my voice just how hurtful the campaign was for me personally.

9. I want people to see these tapes because I believe it will lessen any fear they have about people in the gay community. It is easy to demonize an idea, but hard to demonize a human being. I believe that seeing the emotion and love that we expressed during the trial would have a much bigger impact than someone simply reading the transcript or watching a recreation of the trial.

10. In fact, having attended nearly all of the trial myself, I know firsthand how impactful it is to actually see and hear each of the witnesses testify. When I watched the trial, I knew that I was witnessing history being made. This was the first time that experts had testified on behalf of the LGBT community to explain the ways in which we have been politically and socially marginalized, disadvantaged, and cast aside. I remember moments in the courtroom when there were audible gasps. That's something only the tapes will reveal.

11. Now that ten years have passed since the trial, it is even more clear that these tapes are a powerful piece of history that the public should be able to see. Children will be learning about the gay rights movement in their history classes. It's one thing for them to read about this trial, but it is altogether something else for them to actually be able to *see* the trial for themselves. I want everyone to be able to have that experience, and to be able to sense the emotion and urgency we felt while testifying.

12. Since the trial, Jeff and I have had many people tell us how similar their stories were to our own, and how much our testimony rang true in their own lives. Hearing our testimony gave these people the courage to say and be who they really are. People still come up to us and tell us that to this day. With the release of the trial videos, I know that we would be able to reach so many more people, and hopefully encourage and motivate them to live their lives on their own terms. I hope for the sake of those people, for the sake of history, and for the sake of the gay community as a whole, that these tapes will finally be allowed to be released.

13. Finally, I understand that Proponents have raised concerns regarding how witnesses might be treated if the video recording of the trial is made public. I am not worried about any adverse treatment, such as being targeted or harassed, as a result of the video recording is made public. If I was going to be harassed because I was a gay man, or because of my public participation in this trial, it has happened already, and nothing about the release of the tapes would change that treatment.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 5 day of MAY 2020, at Spain.

Paul Katami

EXHIBIT F

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF RYAN M. KENDALL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Ryan M. Kendall, state:

1. I am Ryan M. Kendall. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I am a gay man, and from the ages of fourteen to sixteen, I was subject to conversion therapy.

3. I was a witness in the Proposition 8 trial in support of the Plaintiff-Intervenors, the City and County of San Francisco. I was aware that the trial would be videotaped when I decided to testify. I testified about my childhood experiences with conversion therapy. I chose to offer my testimony because I thought that the issue of immutability of sexual orientation was very important and that the effects of conversion therapy on LGBT people as a form of discrimination was something that needed to be aired in a public forum.

4. I testified about the negative impact of conversion therapy on me and my family. I spoke about the impact that conversion therapy had on my use of state services, such as therapy. I also testified about the fact that in my experience, conversion therapy is wholly ineffective and harmful. To this day, I believe I remain the only person to testify in federal court about conversion therapy. I am not aware of any other source of testimony under oath in federal court about conversion therapy.

5. It was a weighty decision to testify. I was nervous about the decision, but I ultimately chose to testify because I felt as though I had an obligation to society to participate because of the very high stakes for LGBT rights.

6. Even though it has been more than ten years since the trial took place, there is still discrimination against LGBT people in the United States and around the world. It is essential that people understand the painful realities that flow from the terrible practice of conversion therapy. This is a practice that is still legal in many states, and it causes lifelong damage to LGBT individuals and children, like me, who are exposed to it in misguided efforts to change their sexual orientation or gender identity.

7. Not only are the tapes of the trial the best record of what the fight for marriage equality looked like, my testimony, in particular, is a true account of what conversion therapy is like for LGBT people and children. If these tapes become public, perhaps one day my testimony can help others who are also grappling with the damage wrought by conversion therapy. Moreover, I hope that my testimony can inform the policy and political debates that are now taking place throughout the country and the world about conversion therapy and how best to protect LGBT people from it.

8. Seeing a video of the trial will be very different than reading the trial transcript. There was something real, powerful, and raw about being put under oath, and I want people to not only hear the words the words I spoke, but also see *how* I spoke those words. Indeed, Judge Walker referred to my testimony as "the most touching testimony at trial." The power and veracity of my testimony is best presented by the video recording.

9. Since the trial, I have spoken publicly about my testimony and the practice of conversion therapy. While I have now semi-retired from speaking publicly about this abusive practice in large part because one of the greatest gifts I have given myself is a life beyond conversion therapy, it would be useful to have a video recording of my testimony to which I could point individuals interested in the subject. It takes an emotional toll to talk about my experience with conversion therapy, but with the video, the power of my testimony on the topic could live on without compelling me to engage in the emotional labor of telling my story.

10. Not only do I think it is important for my trial testimony to be made public, I think all of the footage of the trial should be made public. One of the purposes of a trial is a search for the truth and the video shows that truth. This is the *only* federal trial on the issue of LGBT identity. What was at stake was far beyond just marriage—what was at stake was the validity and worth of LGBT identity. After participating in the Proposition 8 trial, I know that this trial was the greatest exploration of issues surrounding LGBT identity that has ever occurred in the federal courts. The stories that the Proposition 8 trial tells should be allowed to continue to resound in the public discourse about LGBT equality and the dignity of LGBT people. It is vital that future generations be permitted to benefit from this historical record.

11. I understand that Proponents have raised concerns regarding how witnesses might be treated if the video recording of the trial is made public. I am not worried about any adverse treatment, such as being targeted or harassed, as a result of the video recording being made public. If I was going to be harassed because I was a gay man, or because of my public participation in this trial, it has happened already, and nothing about the release of the tapes would change that treatment. Furthermore, I believe the minimal risk of harassment is far outweighed by the public interest in releasing the video recordings of this trial.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 7th day of May 2020, at Los Angeles County, California.

Ryan M. Kendall

EXHIBIT G

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF JERRY SANDERS IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Jerry Sanders, state:

1. I am Jerry Sanders. The matters stated herein are true of my own personal knowledge and I could competently testify to them if called as a witness. I make this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings.

2. I am the President and CEO of the San Diego Regional Chamber of Commerce. I served as Mayor of San Diego from 2005–2012, and before that I served as Chief of the San Diego Police Department, among other positions.

3. I was a witness in the Proposition 8 trial in support of the Plaintiff-Intervenors, the City and County of San Francisco. On the sixth day of trial, I testified about my love for my gay daughter and her wife, and how my relationship with them shaped my thoughts and decisions regarding same-sex marriage. I also testified about the LGBT members of the San Diego Police Department and the Police Department's relationship with LGBT members of the community.

4. When I testified at trial, I understood that my testimony was public and that I was being video recorded. At that time I was comfortable with the public nature of my testimony and am still comfortable with it today. In fact, I did not realize until recently that the video record remained under seal.

5. I chose to offer my testimony because I felt strongly that LGBT equality is important. For example, when my daughter entered into a domestic partnership with her same-sex partner in 2009, there was no public celebration. I did not believe domestic partnerships were sufficient—as I testified at trial, everyone deserves the same opportunity to have a wedding in front of their family, friends, and coworkers. I also believed that marriage equality was important to the work of the San Diego Police Department, which strives to treat all communities equally. I did not feel like the LGBT community was treated equally by the government, and I saw the effects of that inequality. For example, I was disappointed when a talented police sergeant was driven from the Police Department because he was gay. Thus, I saw in both my personal and professional life how important LGBT equality is.

6. I believe the public would benefit from seeing the video recording of the trial rather than simply reading the transcript. Transcripts are always very dry and look very different from live testimony. When you see a video, you can see the emotion and the people involved—you see *all* of it.

7. Since the trial, I have spoken publicly about my testimony. For example, I played myself in San Diego production of "8," a play derived from the trial transcripts. I also have spoken numerous times about marriage equality in other public settings. I believe the video of my testimony would enhance my public discussions of marriage equality.

8. Not only do I think it is important for my trial testimony to be made public, I think all of the footage of the trial should be unsealed. This was a landmark case and people have the right to view what was said and done. I cannot think of a reason that, ten years after trial, the video should be withheld from the public.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 6 day of May 2020, at San Diego, California.

Jerry Sanders

EXHIBIT H

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF HELEN ZIA IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Helen Zia, state:

1. I am Helen Zia. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I am a lesbian and have been a lesbian my entire adult life. I am also the daughter of immigrants from China, and am an activist, author, and former journalist. My writings touch on issues ranging from human rights and peace to women's rights and countering hate violence and homophobia, and other matters related to the gay and lesbian community.

3. Social pressures initially steered me away from openly discussing or disclosing my sexual orientation. For example, I faced rejection from friends, family, and community groups that I worked with because I was a lesbian. I went so far as to burn journals of mine that contained confessions of my sexual orientation, and for a period of time would not admit to myself or others that I was a lesbian. Later in life, I become open about my sexual orientation. I have been discriminated against because of this. For example, I was invited to give a speech at Notre Dame, but my invitation was revoked when I said that I might speak about my sexual orientation. I believe that because of my sexual orientation, I lost other work opportunities in my career.

4. I was a witness in the Proposition 8 trial in support of the Plaintiff-Intervenors, the City and County of San Francisco. I testified about my experience getting married almost immediately after marriage licenses were available to same-sex couples in San Francisco in 2004 to my partner of twelve years, and the heartbreaking invalidation of my marriage later that year. I also testified about how, in 2008, my partner and I decided to get married again, as soon as we heard that the opportunity was available to us. Another part of my testimony described how being married changed our lives, tangibly and intangibly.

5. When I testified at trial, I was fully aware that my testimony was public and that I was being recorded on video. I believed the public nature of my testimony to be of great importance at that time, and I believe the same today.

6. I understand that Proponents have raised concerns regarding how witnesses might be treated if the trial recordings are made public. I am not worried about any adverse treatment, such as being targeted or harassed, as a result of the video recording of me being made public. If I was going to be harassed because I was a lesbian, or because of my public testimony in this trial, it has happened already, and nothing about the release of the video recording would change that treatment.

7. I testified at the trial because I felt that it was incredibly important to share with the court and society just how much the earth shifted for me and for my extended family by being able to do something that previously was available only to heterosexual couples but not to me as a lesbian. I had been denied the ability to get married for so long that I felt it would never happen for me and my partner, as though we could never ride in the front of the bus or drink from the clean water fountain, simply because we are a same-sex couple.

8. I also testified because I wanted to share what my marriage and my relationship were like, to attempt to show what the real lives of lesbian couples were like in the world. My relationship is loving, caring, and committed, but we had been demonized by opponents of gay marriage. I believed that it was, and is, important to show the world, on the record, what my relationship with my wife was actually like. Because of this, I think that the video of my testimony should be made public, so that people can put a face to my name, and further see me a real person, in a real relationship. As of this declaration, we have been together for 28 years.

9. My wife and I are an Asian-American couple. By testifying, I also wanted to share my experience as a lesbian and partner in a same-sex marriage in my community. I believe that marriage is more than a commitment between two individuals, and that marriage is the joining together of two families. This was certainly true for me.

10. As I testified at the trial, not only did I feel that my relationship with my wife was more protected by our legally recognized marriage, but I also felt that our extended families saw our relationship as different (in a strongly positive way), more permanent, and that our own parents and family members now saw themselves as related to each other, even if we were not present. I believe that the public release of the video recording of my testimony would allow those who watch the

recording to understand and appreciate the emotion and meaning of my testimony in ways they could not from reviewing a simple transcript.

11. In addition to the video recording of my testimony, I think that all other recordings of the trial should be made public. If any aspect of the trial is permitted to be buried, especially the faces of those involved, I believe that today and tomorrow's opponents of gay marriage could use this to their advantage, by not fully recognizing that real people with real issues at stake were involved in the trial.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed this 11th day of May 2020, at Oakland, California.

Helen Zia

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF DR. NANCY F. COTT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Nancy F. Cott, Ph.D., state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I were to be called as a witness, I could and would testify to what I say in this declaration.

2. I am presently the Jonathan Trumbull Research Professor of American History at Harvard University, and I am the author or editor of eight published books, including *Public Vows: A History of Marriage and the Nation* (Harvard Univ. Press, 2000), the subject of which is marriage as a public institution in the United States. In 2016-2017, I served as President of the Organization of American Historians, the leading and largest group of historians who write and teach U.S. history. I was elected a fellow of the American Academy of Arts and Sciences in 2008.

3. I also have published over thirty scholarly articles, including a number discussing the history of marriage in the United States, such as "How History Matters in Same-Sex Marriage Rights," *Marriage, Law and Modernity: Global Histories*, ed. Julia Moses (London: Bloomsbury, 2018) and "No Objections: What History Tells Us about Same-sex Marriage," *Boston Review*, January 2011. Likewise I have delivered scores of academic lectures and papers over the past forty-five years on a variety of topics, including the history of marriage as related to my trial testimony in this case, such as "Keeping the State in Marriage," Debating Law and Religion, Yale Law School, October 2014, and "The History of Marriage on Trial," Margaret Morrison Distinguished Lecture in Women's History, Carnegie Mellon University, March 2011.

4. I served as an expert witness in this case, testifying on the first and second days of the trial for approximately four hours in total. I testified about the purpose and history of marriage in the United States, including the history of criminalization of marriage across the color line, changes that legislatures and courts had made over time in essential features of marriage, parallels between prohibitions on same-sex marriage and racial restrictions on marriage, federal benefits extended to married couples, and the cultural value of marriage, among various related topics, concluding that allowing same-sex couples to marry would follow in the path of previous significant changes and would be consistent with past valuation of the importance of marriage and child-rearing.

5. I understand that Proponents have raised concerns regarding how witnesses might be treated if the trial recordings are made public. I am not worried about any adverse treatment, such as being targeted or harassed, if the trial recordings of my testimony are released.

6. I believe that the release of the trial recordings for public use is of great importance. Having been in the courtroom for two days, I know firsthand that seeing the trial go on added to my knowledge of what was taking place, far beyond the knowledge that could be provided by a transcript and even beyond an audio record. During the trial, I sat in during the testimony of several other witnesses, and I am sure that my ability to see them be examined and cross-examined, to observe their body language and see their facial expressions, informed my understanding of their testimony and its veracity. For me, seeing what was happening (as compared to reading a transcript), added important dimensions to my comprehension of what was being presented at the trial and what it meant. The visual record of my own testimony, especially during cross-examination, would shed additional light on the pressure applied to points I made, and how I defended my testimony. Able to see the recording, various viewers may possibly analyze my testimony in different ways, and add their understanding of it to the public domain.

7. Having made my career as a professional historian for forty-five years, I feel very strongly that records of important public transactions and events—in whatever format they occur—should be retained and made accessible to a wide public. Otherwise, how can history be understood accurately? Records in all available formats will help future generations understand the truth of the past. I believe it would be a pity and a travesty to allow these trial recordings to remain inaccessible. The fullest possible historical record of the trial will prove invaluable to those who come after us, especially when firsthand recollections are no longer available.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on this 30 day of April 2020, at Cambridge MA.

Nancy F. Cott

Nancy F. Cott

EXHIBIT J

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF DR. M.V. LEE BADGETT IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, M.V. Lee Badgett, Ph.D., state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I am presently a Professor of Economics at the University of Massachusetts Amherst, a Williams Distinguished Scholar at the Williams Institute, UCLA School of Law, and a Fellow of the Salzburg Global Seminar, LGBT Forum. I am also a Co-Founder of the Institute for Gay and Lesbian Strategic Studies, where I served as the Research Director from 1994 to 2006. At the time of the trial, I was the Director of the School of Public Policy at the University of Massachusetts Amherst and Research Director at the Williams Institute, UCLA School of Law.

3. I served as an expert witness in this case, testifying on the sixth day of the trial. I testified about how Proposition 8 inflicted substantial economic harm on same-sex couples and their children who live in California, that same-sex marriages would not have an adverse effect on the institution of marriage or on different-sex couples, that same-sex couples are very similar to different-sex couples in most economic and demographic characteristics, and that Proposition 8 imposed economic losses on the State of California and on counties and municipalities.

4. I would like the trial recordings to be released, and in particular I would like the portion of the recordings that contain my trial testimony to be released. My testimony reflects and would add to my scholarly work, which is publicly available in other mediums. I have published five books, including *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage*, New York University Press, 2009. I have also published dozens of articles, book chapters, and policy studies on topics closely related to my trial testimony, such as "Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?" *Sexuality Research and Social Policy: Journal of NSRC*, Vol. 1, No. 3, September 2004, pp. 1-10, and "Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands," *Journal of Social Issues*, Vol. 67,

No. 2, 2011, pp. 316-334. Most recently, I published a book chapter with Naomi G. Goldberg, Alyssa Schneebaum, and Laura Durso entitled "LGBTQ-Parent Families In the United States and Economic Wellbeing," which will appear in *LGBTQ-Parent Families: Innovations in Research and Implications for Practice*, ed. By Abbie E. Goldberg and Katherine R. Allen, Springer International Publishing, 2020.

5. I understand that Proponents have raised concerns regarding how witnesses might be treated if the trial recordings are made public. I am not worried about any adverse treatment, such as being targeted or harassed, if the trial recordings of my testimony are released. To the contrary, I see no reason not to release the recordings, given that the transcripts of the trial are publicly available, and the trial has already been reenacted and written about in great detail. There is nothing about the trial that is not already "public."

6. Yet, even though people can learn about the trial through these other sources, I believe that the release of the trial recordings for public use is of vital significance. There are certain nuances that will become apparent from the trial recordings that one simply cannot get from these other sources, such as the emotion with which the witnesses testify and the tone of their voices. In fact, during the trial, I observed the body language and tone of other witnesses who testified, which informed my understanding of their testimony and its veracity.

7. It is my opinion that the trial recordings are of great historical value, and that they would be an invaluable learning tool for students studying the issues of gay rights and marriage equality. In fact, I teach a class on LGBT issues related to economics and public policy, and if the recordings were publicly available, I would show the tapes in my classroom. It would be extremely powerful for my students to be able to witness firsthand testimony that is directly relevant to the topics they are studying.

8. I feel strongly as an academic and as a participant in the trial that the recordings should be released publicly, so that this important historical record can be used for generations to come.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on this 7th day of May 2020, at Northampton, MA.

M.V. Lee Badgett

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF EDMUND A. EGAN IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Edmund A. Egan, declare and state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I am an economist by training and have been the Chief Economist for the City and County of San Francisco since 2007. I hold a Ph.D. in City and Regional Planning from the University of California, Berkeley, and I have authored several peer-reviewed articles on economic analysis and policy.

3. I served as an expert witness in this case, testifying on the fourth day of the trial. I testified at the request of the Plaintiff-Intervenor City and County of San Francisco, but I also wanted to support Plaintiffs on a personal level. I testified about economic research the City of San Francisco had conducted regarding the economic impact of marriage between same-sex couples, including the impact on San Francisco's revenues and overall budget.

4. When I testified at trial, I understood that my testimony was public and that I was being video recorded. At that time I was comfortable with the public nature of my testimony and am still comfortable with it today.

5. I would like the trial recordings to be released, and in particular I would like the portion of the recordings that contain my trial testimony to be released.

6. I understand that Proponents have raised concerns regarding how witnesses might be treated if the trial recordings are made public. I am not worried about any adverse treatment, such as being targeted or harassed, if the trial recordings of my testimony are released. I was not worried about such adverse treatment when I testified, and I am not worried about it now.

7. I believe that the release of the trial recordings for public use is important. For example, I believe that there is value to historians being able to watch the trial, including the facial expressions and reactions of witnesses that cannot be seen from a transcript. When I watched the

trial first-hand, witnesses' facial expressions and reactions were important to how I perceived their testimony, and I believe that others would similarly benefit from being able to see them. I do not want to preclude any future historian or interested member of the public from deciding for themselves whether to watch the video recording of my testimony. I certainly do not believe there is any rational reason to continue to seal the video recording of my testimony, and any purported harm from unsealing would pale in comparison to the value of historians and the public being able to witness this historic trial for themselves.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on this _30th__ day of __April___ 2020, at Alameda, California.

Edmund A. Egan, Ph.D.

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Paul T. Katami, and Jeffrey J. Zarrillo

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF DR. GREGORY M. HEREK IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Gregory M. Herek, Ph.D., state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I were called as a witness, I could and would testify to what I say in this declaration.

2. I am Professor Emeritus in the Department of Psychology at the University of California, Davis. Over the course of my career, I have published more than 100 scholarly papers addressing topics related to sexual orientation, HIV/AIDS, or attitudes and prejudice directed at sexual and gender minorities, and have edited, coedited, or coauthored eight scholarly volumes on these topics. My professional service has included serving as a reviewer for numerous funding agencies, including the National Institutes of Health, the National Science Foundation, and the American Psychological Foundation. I have served on scientific and professional committees that dealt with research and policy related to sexual orientation, sexual minorities, and gender minorities, including as a member of the National Academy of Sciences Institute of Medicine's Committee on Lesbian, Gay, Bisexual and Transgender Health Issues and Research Gaps and Opportunities from 2010 to 2011.

3. I served as an expert witness in this case, testifying on the ninth day of the trial. I testified about the nature of sexual orientation and how it was understood in the fields of psychology and psychiatry at that time, the amenability of sexual orientation to being changed through interventions and through various intervention techniques, and the nature of stigma and prejudice related to Proposition 8. In my testimony, I drew upon the work of numerous scholars in the social and behavioral sciences. I also drew upon my own published work including, for example, my 2006 article published in *American Psychologist*, *61*, 607-621, entitled "Legal recognition of same-sex relationships in the United States: A social science perspective," and my 2007 paper with Linda D. Garnets entitled "Sexual orientation and mental health," published in the *Annual Review of Clinical Psychology, 3*, 353-375.

4. I support the release of the trial recordings to the public, including release of the recordings of my own trial testimony, for at least three reasons. First, the trial was an historic moment in American history in general, and specifically in the history of the movement for marriage equality. To my knowledge, there has never been another trial that so extensively scrutinized scientific and historical knowledge about sexual orientation, personal relationships, marriage, and related topics, and actually put experts on the stand to explain and be cross-examined about this body of knowledge. Releasing the recordings will permit the public to witness and relive this historic moment for generations to come in a way that is altogether different from simply allowing them to read a written transcript. I believe that not releasing the tapes would deprive the American people of access to this important piece of history.

5. Second, the expert testimony included extensive explanation and discussion of the then-current state of scientific knowledge about marriage, sexual orientation, and related topics. Thus, allowing the public to view the tapes will give them an experience akin to auditing an advanced seminar in which they can observe leading experts discussing relevant theory and research. Again, this would be a very different experience from simply allowing the public to read the trial transcript.

6. Third, I believe that the trial, and in particular the testimony of the expert witnesses, provided an important demonstration of the ways in which scientific research and expertise can play a crucial role in informing social policy and the law. Thus, releasing the tapes will also serve a more general educative function, showing how social science data can be applied to a legal issue related to civil rights.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on this 10th day of May, 2020, at Berkeley, California.

Gregory M. Herek

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF MICHAEL LAMB IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Michael Lamb, declare and state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I am a psychologist by training and am an Emeritus Professor of Psychology at the University of Cambridge. I hold a Ph.D from Yale University. My research and publications focus on developmental science.

3. I served as an expert witness in this case, testifying on the fifth day of the trial. I testified at the request of the Plaintiffs. I testified about research showing that children and adolescents raised by same-sex parents are as likely to be well-adjusted as children raised by heterosexual parents, including "biological" parents. Numerous studies by respected researchers and published in peer-reviewed academic journals have reached this same conclusion—children of same-sex parents are just as successful psychologically, emotionally, and socially as children raised by heterosexual couples. I also testified that children and adolescents with same-sex parents would benefit if their parents were able to marry. The research in this area that has been conducted since I testified has continued to support the conclusions that I presented at trial.

4. When I testified at trial, I understood that my testimony was public and that I was being video recorded. At that time I was comfortable with the public nature of my testimony and am still comfortable with it today.

5. I understand that Proponents have raised concerns regarding how witnesses might be treated if the trial recordings are made public. I am not concerned that I will be targeted or harassed as a result of a video of my trial testimony being publicly released.

6. I would like the trial recordings to be released, and in particular I would like the portion of the recordings that contain my trial testimony to be released. I believe that the release of the trial recordings for public use is important. In a country governed by the rule of law, it is essential that

proceedings remain as open to the public as possible. This is particularly true when the case, like this one, is of such great public import. I have always thought that the public deserved to see this trial, and the release of the recordings will effectuate that.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on this 2nd day of May 2020, in Chestertown, Maryland.

Michael Lamb, Ph.D.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF ILAN H. MEYER IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Ilan H. Meyer, declare and state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I hold a Ph.D. in Sociomedical Sciences and Social Psychology from Columbia University. I am a Professor Emeritus of Sociomedical Sciences at Columbia University and the Williams Distinguished Senior Scholar for Public Policy at the Williams Institute at University of California Los Angeles School of Law and Adjunct Professor at the Fielding School of Public Health at the University of California Los Angeles. My research and publications focus on developing a model of minority stress, which has guided my and other investigators' population research on LGBT health disparities by identifying processes by which social stressors related to prejudice and stigma impact health and describing the harm to LGBT people from prejudice and stigma.

3. I served as an expert witness in this case, testifying on the fourth day of the trial. I testified at the request of the Plaintiffs. I testified about the stigma and prejudice LGB people face in society, minority stress, and the effect of minority stress on mental health in the LGB population. I also testified about the effects of Proposition 8 on the mental health of gay men and lesbians.

4. When I testified at trial, I understood that my testimony was public and that the trial was being recorded on video. At that time, I was comfortable with my testimony being recorded and public. I continue to be comfortable with it today.

5. I understand that the Proponents of Proposition 8 have noted concerns about how making these tapes public could have adverse consequences for some of the witnesses, including by leading to harassment or mistreatment. I am not personally worried that I will suffer any adverse consequences as a result of a video of my testimony being released.

6. I support the public release of the trial recordings, and in particular I would like the portion of the recordings that contain my trial testimony to be released. This trial was of great historical

significance. The video recording of the trial is, unquestionably, the most accurate representation of the culture and commentary surrounding the marriage equality debate a decade ago and at its most divisive. In contrast to video clips from news shows at the time, there is a weightiness to the recording of the trial. During trial, witnesses were placed under oath and the statements they made were under penalty of perjury. Witnesses were therefore required to tell the truth about the issues germane to the question of marriage equality, including whether a relationship with a same-sex partner stands on equal footing with that of an opposite-sex partner. From an educational perspective, this record is important to educate LGB young people, for whom marriage equality is a given, about this historical period when the trial took place. It is also important to demonstrate to LGB and other marginalized groups the importance that research can play in arguments about social policy and law. One group with whom I would certainly share any portion of the trial recordings that are released are the students I teach. When I speak to students about the trial, it is often difficult for these young people to comprehend that there had to be a trial in federal court about whether LGB people's relationships deserve to be treated as equal to those of their heterosexual counterparts. These tapes would help me and other educators bridge that gap.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on this 6th day of May 2020, at Los Angeles, CA.

Ilan Meyer

Ilan H. Meyer, Ph.D.

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Paul T. Katami, and Jeffrey J. Zarrillo

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF LETITIA A. PEPLAU IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Letitia A. Peplau, declare and state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I am a psychologist by training and taught graduate-level psychology for over 30 years until my retirement in 2018. I hold a Ph.D. in Social Psychology from Harvard University, and I have authored or co-authored dozens of scholarly works on personal relationships, gender, and sexual orientation.

3. I served as an expert witness in this case, testifying on the third day of the trial. I testified about the various benefits associated with marriage, the similarity between same-sex and opposite-sex relationships, and the benefits that same-sex couples likely would receive from the availability of marriage.

4. When I testified, I knew that my testimony would be public and that I was being video recorded. I was comfortable with the public nature of my testimony at that time and am still comfortable with it today.

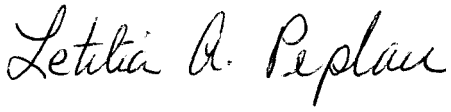
5. I would like the trial recordings to be released, and in particular I would like the portion of the recordings that contain my trial testimony to be released. My testimony reflects and would add to my scholarly work, which is publicly available in other mediums. For example, I have shared similar opinions in my lectures at various colleges, including the University of California, Los Angeles and the University of Michigan. I believe that the testimony I offered at trial has been confirmed by subsequent research. I further believe that my testimony played a small role in the rapid evolution of the public's attitude toward marriage equality because the more people know about marriage equality, the more likely they are to support it.

6. I understand that Proponents have raised concerns regarding how witnesses might be treated if the trial recordings are made public. I am not worried about any adverse treatment, such as being targeted or harassed, if the trial recordings of my testimony are released.

7. I believe that the release of the trial recordings for public use is of the utmost importance. The trial was unique in many respects, but a principal benefit of the trial was how it brought together such a wide array of experts who spoke in considerable detail about facts related to such an important societal issue. I believe the public would benefit greatly from seeing the video recording of these experts. I further believe that both historians and social scientists would benefit from seeing the witnesses' demeanor and reactions rather than reading from a transcript. When I watched the trial first-hand, witnesses' facial expressions and reactions were important to how I perceived their testimony, and I believe that others would similarly benefit from being able to see them.

8. In the years following the trial, while I was still teaching, I would discuss the trial in appropriate educational settings. When I did so, many students remarked that they wished they could see the trial rather than simply hear about it. I believe that showing excerpts of the video recording would be invaluable in certain educational settings.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on this 1st day of May, 2020, at Los Angeles, California.



Letitia A. Peplau, Ph.D.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

and

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

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GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

PROPOSITION 8 OFFICIAL PROPONENTS DENNIS HOLLINGSWORTH, et al.

Defendants-Intervenors.

CASE NO. 09-cv-2292-WHO

DECLARATION OF DR. GARY M. SEGURA IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

I, Gary M. Segura, Ph.D., state:

1. I am submitting this declaration in support of Plaintiffs' Opposition to the Motion to Continue the Seal of the Trial Recordings. What I state in this declaration is true, and known to me personally. If I was called as a witness, I could and would testify to what I say in this declaration.

2. I am Dean and Professor at the Luskin School of Public Affairs, University of California, Los Angeles. From 2008 to 2016, I was a Professor in the Department of Political Science at Stanford University and a Faculty Affiliate in African and African American Studies, American Studies, Comparative Studies in Race and Ethnicity, Feminist/Gender/Sexuality Studies, Latin American Studies, and Urban Studies. In the 2015-2016 academic year, I served as the Morris M. Doyle Professor of Public Policy at Stanford University. I also co-directed the Stanford Center for Democracy, which is designed to use empirical techniques to explore American electorate data.

3. I served as an expert witness in this case, testifying on the sixth and seventh days of the trial. I testified about how gays and lesbians did not possess a meaningful degree of political power in the U.S., that they were worse off than other groups that enjoy judicial protection, and I also explained how some of the conclusions drawn by the Proponents' expert, Dr. Kenneth Miller, were deeply troubling to me based on my own research. More specifically, I explained that political power is defined as the ability of an individual or group to achieve and secure their interests in the political system, and to do so by relying primarily on themselves, and that gays and lesbians were a minority faction under these terms. Prior to testifying, I had published articles and book chapters related to this topic. For example, I published a book chapter entitled "Institutions Matter: Local Electoral Laws, Gay and Lesbian Representation, and Coalition Building Across Minority Communities," in *Gays and Lesbians in the Democratic Process*, 220-241 (1999), Columbia University Press, edited by Ellen Riggle and Barry Tadlock.

4. I understand that Proponents have raised concerns regarding how witnesses might be treated if the trial recordings are made public. I have no concerns about being targeted or harassed as a result of the release of the recordings.

5. To the contrary, I would like the portion of the recordings that contain my testimony—and the trial recordings in general—to be publicly released. Social change cannot occur in an information vacuum, and I believe that the public is better off knowing and understanding to the fullest extent the arguments that were made in the important constitutional evolution of the issue of same-sex marriage. If one believes in an informed public and democratic deliberation, hiding or making less accessible any information surrounding that deliberative process is fundamentally anti-democratic. The trial recording is an important historical record that would add to the public's understanding of what took place.

6. Furthermore, the fight for LGBT rights is far from over. Even today, there are states attempting to erode the significant progress that has been made in LGBT equality. For this reason, I believe it is important for the public to be reminded of the foundation of the original ruling guaranteeing marriage equality, and one significant way to do that is by showing them this historic trial as it actually took place.

7. In addition to testifying at the trial, I also observed several of the other witnesses testify. It was extremely powerful and impactful to watch these witnesses testify and to see them questioned and cross-examined. There were certain events that took place in the courtroom that you will never be able to glean from the trial transcript. I recall long pauses when the expert witnesses on the Proponents' side were asked difficult questions to which they had no answer. Those pauses would not be apparent from the trial transcript. I also remember audible gasps and other reactions from those observing the trial that you would not get from the transcript. The trial recordings are vital to maintaining a complete record of this historic trial.

8. For all of these reasons, I am strongly in favor of the release of the trial recordings.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on this 11th day of MAY 2020, at Los Angeles, CA.

Gary M. Segura

EXHIBIT 4

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M. PERRY, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, et al.,

Defendants,

and

DENNIS HOLLINGSWORTH, et al.,

Defendants-Intervenors.

CASE NO. 09-CV-2292-WHO

DEFENDANTS-INTERVENORS' REPLY IN SUPPORT OF THEIR MOTION TO CONTINUE THE SEAL

Date: June 17, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Location: Courtroom 2, 17th Floor

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Rules

INTRODUCTION

In 2010, the U.S. Supreme Court intervened on an emergency and extraordinary basis to prevent former Chief Judge Vaughn Walker from publicly broadcasting the trial over the constitutionality of Proposition 8 as "contrary to federal statutes and the policy of the Judicial Conference of the United States." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). Over Proponents' objection, Judge Walker continued to videotape the trial; but to maintain compliance with the Supreme Court's emergency order, he unambiguously assured Proponents that the recordings were solely "for purposes . . . of use in chambers" and that they were "not going to be for purposes of public broadcasting or televising." Trial Tr. at 754 (Vol. 4). Proponents accepted and relied on this assurance, taking no further action. Again at the conclusion of the trial, when Judge Walker placed the recordings in the Court's record under seal, he unequivocally promised that "the potential for public broadcast" of the trial proceedings "had been eliminated." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 944 (N.D. Cal. 2010) (emphasis added). And again, Proponents relied on this clear judicial commitment. As the Ninth Circuit held, Judge Walker thus twice "unequivocally promised that the recording of the trial would be used only in chambers and not publicly broadcast. He made these commitments because the Supreme Court had intervened in this very case in a manner that required him to do so." *Perry v. Brown*, 667 F.3d 1078, 1081 (9th Cir. 2012).

In the teeth of these solemn guarantees, KQED and Plaintiffs ask this Court to unseal and publicly disseminate the trial videotapes that Judge Walker promised would never be released. They attempt to sweep the Ninth Circuit's conclusions in the 2012 *Perry* appeal aside, seizing on the court's statement that broadcast could not take place "at least in the foreseeable future." *Id.* at 1084–85. But the most that can be said is that the specific *holding* of the Ninth Circuit in *Perry* did not address the issue whether the seal could be lifted after ten years have passed. The Court's *reasoning*—as binding, here, as its holding—is not so limited: maintaining the seal was necessary, the Ninth Circuit explained, to keep faith with Judge Walker's "promise[ ] . . . that the conditions under which the recording was maintained *would not change*—that there was *no possibility* that the recording would be broadcast to the public *in the future*." *Perry*, 667 F.3d at 1086 (first emphasis in original). That promise plainly had no time horizon.

KQED and Plaintiffs' request to unseal and broadcast these video recordings fails for multiple other reasons as well. The common-law right of access provides no basis for their request, both because it has been displaced by the Local Rules prohibiting the recordings' broadcast and because the common-law right does not attach to derivative documents of this kind. Local Rule 79-5 simply does not apply here. And the First Amendment changes nothing because binding precedent squarely holds that there is no First Amendment right to view recordings of this kind where the trial was open to the public and transcripts of the recordings are freely available.

In 2012, faced with much the same arguments as those advanced by Plaintiffs and KQED today, the Ninth Circuit had no difficulty concluding that "Proponents were . . . entitled to take Chief Judge Walker at his word when he assured them that the trial recording would not be publicly broadcast or televised" and accordingly that "[t]he interest in preserving respect for our system of justice is clearly a compelling reason for maintaining the seal on the recording." *Perry*, 667 F.3d at 1088. The interest in judicial integrity has become no less compelling in the eight years that have passed since those words were written. The seal should remain in place.

ARGUMENT

I. THE COMPELLING INTEREST IN JUDICIAL INTEGRITY CONTINUES TO REQUIRE MAINTAINING THE SEAL.

In its 2012 decision rejecting KQED's previous attempt to obtain the trial recordings, the Ninth Circuit held that any right to access the tapes is decisively outweighed by the judicial branch's compelling interest in keeping its own promises. For the reasons discussed *infra* in Part II, neither KQED or anyone else has any right to access the videotapes that Judge Walker solemnly promised would never be released—not under the common law, not under the Local Rules, and not under the First Amendment. But even assuming one of those doctrines *did* grant such a right, the compelling interest in judicial integrity continues to provide an independent, overriding reason to reject KQED's request without even reaching any of these issues. We accordingly begin there.

As the Ninth Circuit described in *Perry*, in the course of defending his decisions both to create the video recordings and to place them in the record under seal, Judge Walker made repeated, "unequivocal assurances that the video recording at issue would not be accessible to the public." 667

F.3d at 1085. Because "the explicit assurances that a judge makes—no less than the decisions the judge issues—must be consistent and worthy of reliance," Judge Reinhardt's opinion for the panel concluded that "the setting aside of those commitments would compromise the integrity of the judicial process." *Id.* at 1087, 1088. That is no less true today.

Plaintiffs argue that allowing the trial recordings to be disclosed and broadcasted—the very thing Judge Walker said that he had "eliminated" as a possibility, *Perry*, 704 F. Supp. 2d at 944—would somehow not be "inconsistent with any 'assurances' provided by Chief Judge Walker," because, they say, "at no point did Judge Walker 'promise' that [the recordings] would be sealed indefinitely." Plaintiffs' Opp. to Mot. to Continue the Seal 15 (May 13, 2020), Doc. 895 ("Plaintiffs' Br."). Similarly, KQED claims, apparently with a straight face, that "nothing in Judge Walker's statement conveyed its application to future broadcasts." KQED Inc.'s Opp. to Defs-Intervenors' Mot. to Continue the Seal 16 (May 13, 2020), Doc. 898 ("KQED's Br."). We confess we have a quite markedly different idea of what the word "eliminated" means—and so, apparently, did the Ninth Circuit. Indeed, Plaintiff and KQED's argument is *flatly contrary* to the decision in *Perry*—for if Judge Walker's assurances did not apply at all to "future broadcasts," it is difficult to fathom why the Ninth Circuit (1) reacted so unfavorably to his disclosure and public display of the tapes months after the trial, (2) reversed this Court's order unsealing them and "permit[ting] the broadcast of the recording for all to view" over a year later, and (3) remanded with "instructions to maintain the trial recording under seal." *Perry*, 667 F.3d at 1080, 1089.

Trying a different tack, Plaintiffs argue that the disclosure and dissemination of the recordings may be squared with Judge Walker's assurances nonetheless because "any such assurance was by its nature tethered to the default rule that sealing ordinarily expires after ten years." Plaintiffs' Br. 15; *see also* KQED's Br. 3. But neither Plaintiffs, KQED, or any of the other entities seeking to now undo his solemn assurances can point to *any suggestion anywhere* by Judge Walker that the "potential for public broadcast" of the proceedings—after having been "eliminated"—would somehow spring back into being, ten years later. That is of course why Plaintiffs are forced to resort to the circumlocution that Judge Walker's representation was "*by its nature* tethered to the [ten-year] default rule," Plaintiffs' Br. 15 (emphasis added)—because they cannot say it was *actually* tethered to that

rule. He never even referenced the rule.

Unable to find anything in Judge Walker's promises that would cause them to expire after ten years, both Plaintiffs and KQED turn to the Ninth Circuit's decision in *Perry*. Homing in on the court's statement that broadcast could not occur "at least in the foreseeable future," along with its citation, in a footnote, to Rule 79-5(g), 667 F.3d at 1084–85 & n.5, they argue that the Ninth Circuit "made clear that the compelling reason . . . to seal the videotaped trial records would not endure forever." KQED's Br. 18; *see also* Plaintiffs' Br. 14. But ten years can hardly be said to be beyond the "foreseeable future." And while the Ninth Circuit's reference to Rule 79-5(g)'s ten-year default rule may be enough to show that its specific *holding* does not dictate that the recordings must remain sealed beyond "the foreseeable future," the doctrine of *stare decisis* requires obedience not only to a previous case's narrow holding, but also to its animating reasoning. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). And the Ninth reasoning—by focusing on Judge Walker's "promise[ ] . . . that the conditions under which the recording was maintained *would not change*—that there was *no possibility* that the recording would be broadcast to the public *in the future*"—simply cannot be read as good for ten years only. *Perry*, 667 F.3d at 1086 (first emphasis in original).

KQED and Plaintiffs next seize upon a brief statement by Proponents' counsel, at oral argument in 2011, that under the Local Rules the seal on the recordings lasts for a minimum of ten years, suggesting that this aside amounts to an "admission" that now forecloses any argument that Proponents reasonably expected the recordings to remain permanently confidential. KQED's Br. 18–19 n.2; Plaintiffs' Br. 14–15. But as the Ninth Circuit has held, a party's statement of its position on some issue does not preclude it from later articulating a different view, upon reflection, unless (1) "the party . . . succeeded in persuading a court to accept that party's earlier position," and (2) the opposing party would suffer an "unfair detriment" from the change of course. *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 558 (9th Cir. 2016). Here, neither condition is met. The Ninth Circuit did not rely on counsel's interpretation of the local rules in reaching its decision in *Perry*, and neither KQED nor Plaintiffs have even attempted to show any prejudice that would justify judicial estoppel.

In all events, counsel was careful to emphasize in the very exchange at issue that even if the ten-year presumption applies, the local rules *themselves* allow that period *to be extended for good*

cause. Oral Argument at 6:24, *Perry v. Brown*, No. 11-17255 (9th Cir. Dec. 8, 2011), *available at* https://goo.gl/coepDh; *see also* N.D. CAL. L.R. 79-5(g). Given that Judge Walker's promises easily *meet* that standard, *Perry*, 667 F.3d at 1088, counsel's reference to Rule 79-5 would show nothing *even if* it was somehow controlling here.

In addition to dramatically undermining public confidence in the courts, a failure by the judicial system to honor the solemn commitments of its judges would also seriously harm those who reasonably rely on those commitments. The parties and witnesses who testified in this case and the lawyers who questioned them, for instance, did so in reliance on Judge Walker's promise that the videotapes being made would not be publicly released. Both the record and the Supreme Court's opinion in *Hollingsworth* discuss in detail the threats and harassment supporters of Proposition 8 have already suffered. *See, e.g.*, Dkt. #187-2 ¶¶ 11–12; Dkt. #187-9 ¶¶ 6–8; Dkt. #187-11; Dkt. #187-12 ¶¶ 5–6; *Hollingsworth*, 558 U.S. at 185–86. And public broadcast of the trial recordings would increase exponentially the opportunities for abuse. KQED insists that it merely wishes to "make productive, educational uses out of the videotapes and put them in context." KQED's Br. 24. But even assuming that is so, once the recordings have been broadcast and uploaded to the internet, KQED will obviously have no control over how they are used. Appellees' Amici also ask the Court to ignore this concern, but their arguments for access in fact prove its validity: it is precisely because videotapes can be made to "amplify[ ] the impact of the information presented"—irresponsibly as well as responsibly—that Proponents sought (and, twice, obtained) Judge Walker's solemn and unequivocal assurances that the tapes would not be publicly broadcast. Brief of Amici Curiae Reporters Committee and 36 Media Organizations at 9 (May 13, 2020), Doc. 899-2 ("Reporters' Amicus").

Plaintiffs also fault us for failing to provide any new "evidence that Proponents or anyone who testified on their behalf would suffer any harm from unsealing the video recording." Plaintiffs' Br. 8. And they urge the Court to draw adverse inferences from counsel's refusal of their extraordinary request that they be allowed to interview William Tam and Proponents' supporting witnesses, despite their adverse relationship in this proceeding. All of this is of no moment. We have not provided further evidence of harassment because we have *never relied upon harassment* as an independent reason to maintain the seal. Rather, as we have explained, the past harassment of Prop 8

supporters illustrates the potential real-world consequences of undermining the structural value of judicial integrity.

That also suffices to dispose of Plaintiffs' alternative suggestion that the Court should "unseal the testimony, whether given on direct or cross-examination, of any witness called by Plaintiffs, as well as any lawyer argument." *Id.* at 24; *see also* Reporters' Amicus 15–16. The suggestion that this partial unsealing would be a "more narrowly tailored" solution rests entirely on the premise that the only reason for maintaining the seal is the "harm that purportedly would flow to [Proponents'] witnesses and Proposition 8 supporters" from disclosure. *Id.* at 23–24 (quotation marks omitted). As just discussed, that is not so; instead, the compelling interest that requires the videotapes to remain sealed is the judiciary's obligation to keep faith with Judge Walker's promise that those recordings would never be disclosed. And the only "narrowly tailored" way to honor Judge Walker's promise that he had "eliminated" the possibility that the trial recordings would be publicly disclosed and disseminated *at all*, *Perry*, 704 F. Supp. 2d at 944, is to *prevent the trial recordings from being publicly disclosed and disseminated at all*.

Plaintiffs' argument for partial disclosure also ignores the fact that Proponents' attorneys, as well as their witnesses, *also* reasonably relied on Judge Walker's assurances that the trial would not be broadcast. Plaintiffs' themselves say that their proposed partial unsealing would reach "any lawyer argument." Plaintiffs' Br. 24. But Judge Walker's repeated promises that the recordings would never be disclosed extended to Proponents' lawyers as well as their witnesses—indeed, Judge Walker made that promise in open court to one of them. Trial Tr. at 754 (Vol. 4). And the value of judicial integrity demands that faith in "the explicit assurances that a judge makes" must be preserved not only among "[l]itigants and the public," but also the officers of the Court. *Perry*, 667 F.3d at 1087–88.

KQED notes that a permanent seal is "rarely" appropriate, KQED's Br. 19, but as explained in the very authority it cites, "[t]here are occasions when permanent sealing is justified." *Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Arizona*, 156 F.3d 940, 948 n.2 (9th Cir. 1998). And just like the example of grand jury proceedings identified in *Phoenix Newspapers*, *id.*, where the court's "obligation . . . to preserve the secrecy of grand jury proceedings and the privacy of jurors" endures without any temporal limit, *United States v. Sierra*, 784 F.2d 1518, 1522 (11th Cir. 1986),

the judiciary's compelling interest in honoring a federal judge's promise, in open court, that "the conditions under which the recording was maintained *would not change*—that there was no possibility that the recording would be broadcast to the public in the future," *Perry*, 667 F.3d at 1086, has no time horizon.

Ultimately, the bulk of Plaintiffs' and KQED's briefing—and the entirety of the vaunted "multiple new declarations" they put in, KQED's Br. 2—is comprised of variations on the theme that the sealed video recordings are "a valuable historical record," Plaintiffs' Br. 1, and that their public broadcast would "provide an unprecedented and wholly unique perspective" into the trial, KQED's Br. 24; *see also* Brief Amicus Curiae of ACLU of N. Cal. at 2 (May 13, 2020), Doc. 896 (urging the Court "to evaluate arguments in favor of continued sealing in light of the weighty interest KQED seeks to vindicate here"). But whether or not that is so, any suggestion that these values should *outweigh* the judiciary's structural interest in keeping its own promises simply cannot be squared with the Ninth Circuit's express holding that "[t]he interest in preserving respect for our system of justice is clearly a compelling reason for maintaining the seal on the recording, notwithstanding any presumption that it should be released." *Perry*, 667 F.3d at 1088.

II. NONE OF KQED'S OR PLAINTIFFS' DOCTRINES REQUIRES DISCLOSURE AND DISSEMINATION OF THE VIDEO RECORDINGS.

A. The Common-Law Right of Access Does Not Apply for Multiple Reasons.

Both Plaintiffs and KQED point to the common-law "right of access" as providing them a right to obtain and broadcast the trial videotapes. It does not, for two independently sufficient reasons.

1. Because the common-law "right of access" to judicial proceedings and documents "is not of constitutional dimension," *Valley Broad. Co. v. United States Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1293 (9th Cir. 1986), it may be superseded or "displaced" by positive law, including judicial rules. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 605–07 (1978); *American Elec. Power v. Connecticut*, 564 U.S. 410, 424 (2011); *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998). Nor, contrary to KQED's suggestion, does the Court need to strain to find a reading of positive law that is consistent with the common-law right. While statutes "are to be read with a presumption favoring the retention" of *state* common law rules, *see* KQED's Br. 15–16

(quoting *Pasquantino v. United States*, 544 U.S. 349, 349 (2005)), because *federal* common law exists only by "necessary expedient," it is displaced far more readily—whenever positive law "addresses a question previously governed by a decision rested on federal common law," thereby happily eliminating "the need for such an unusual exercise of lawmaking by federal courts." *City of Milwaukee v. Illinois and Michigan* (*Milwaukee II*), 451 U.S. 312, 304, 314 (1981). As shown in our opening brief, Rule 77-3 "addresses [the] question" previously answered by the common-law rule of access in this area, and it therefore displaces the common-law right and erects, in its place, an absolute bar on the broadcast of trial video recordings.

Plaintiffs and KQED attempt to undermine this conclusion, but their principal argument is based on a fundamental misconception about how Rule 77-3 operates. Rule 77-3, both parties insist, "says nothing about sealing (or unsealing) court records," Plaintiffs' Br. 20, because it only limits "the *contemporaneous* broadcasting or televising of court proceeding[s]," KQED's Br. 12. That reading of Rule 77-3 is flatly contrary to its plain text, the Ninth Circuit and this Court's interpretation of it, and all sense. First the text: the rule, again, provides that "public broadcasting or televising, *or recording for those purposes* in the courtroom or its environs, in connection with any judicial proceeding, is prohibited." N.D. CAL. L.R. 77-3 (emphasis added); *accord* N.D. CAL. L.R. 77-3 (2009). The Rule thus bars not just the contemporaneous "broadcasting or televising" of judicial proceedings but also "recording" a proceeding "*for those purposes*." N.D. CAL. L.R. 77-3 (emphasis added). And the only function of this second portion of the Rule is obviously to allow a video recording to be subsequently used for *some* purposes (such as use "by a Judge . . . [in] his or her own chambers," Rule 77-3) but *not others* (namely, subsequent "public broadcasting or televising").

Indeed, if KQED and Plaintiffs' reading of the Rule were correct, nothing would have stopped Judge Walker from disseminating the video recordings to the public *the week following the trial*—or even from broadcasting, each day, the prior day's proceedings. It is passing strange, on their view, *why* Judge Walker promised to use the recordings only for "preparing the findings of fact" *to begin with*. Trial Tr. at 754 (Vol. 4). For by their lights, once the recording was made, *all bets are off*, so long as any broadcast does not take place "contemporaneously." It is also quite inexplicable, on KQED and Plaintiffs' interpretation, why the Ninth Circuit concluded that had Judge Walker *not*

made that promise, Proponents could very likely have obtained an Order from the Supreme Court directing him to refrain from creating a recording that "might . . . be released for viewing by the public, *either during or after the trial*." *Perry*, 667 F.3d at 1085 (emphasis added). Of course, the reason why Judge Walker, the Ninth Circuit, and all the parties behaved in these ways is in fact no mystery—they all understood that Rule 77-3 prohibits not only the contemporaneous "broadcasting or televising" of judicial proceedings but also the *subsequent* use of a "recording" of the proceedings "*for those purposes*." N.D. CAL. L.R. 77-3 (emphasis added).

KQED and Plaintiffs get no further by suggesting that lifting the seal now would not result in the "broadcast" of the recordings. KQED's Br. 13; Plaintiffs' Br. 20. To be sure, "members of the public c[ould] use it for other purposes." *Id.* at 16. But given that the very party seeking access to the videotapes is "a public broadcaster" that "operates the nation's most listened to public radio station and the most popular public television stations in the San Francisco Bay Area" and has avowed the intention of "producing an educational television special" using the recordings and "making available online key moments of the trial," KQED's Br. 6–7, the one use the Court can be *sure* will be made of the recordings *is broadcasting and televising*. KQED's suggestion that Rule 77-3 does not apply because it "does not seek to broadcast" the video recordings, *id.* at 13, is simply beyond the pale.

2. Even if the common-law right of access *were not* superseded by Rule 77-3, it still would not apply to the videotapes at issue, because they are wholly derivative recordings of trial proceedings that took place in open court for all to see. As the Eighth Circuit persuasively held in *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996), the common-law right does not apply to these derivative types of materials. Both KQED and Plaintiffs attempt to distinguish *McDougal*, based on the fact that the recordings here "are a verbatim audio-visual record of the full trial proceedings" rather than the recording of a deposition. KQED's Br. 17; *see also* Plaintiffs' Br. 20. That line of argument simply *ignores McDougal*'s reasoning, rather than distinguishing it. As *McDougal* was at pains to emphasize, the recording at issue there—as here—was "an electronic recording of witness testimony." 103 F.3d at 657. To be sure, the witness testimony in *McDougal* was presented by means of a videotaped deposition, rather than through an in-person presentation; but the *McDougal* court could not have been clearer that it was treating that video-recorded deposition testimony "on equal footing" as "live

in-court testimony" to honor FED. R. CRIM. P. 15's mandate that deponents under that rule be "treated equally to witnesses who testify in court, in person." *Id.* The recording in *McDougal* was thus on all fours with the trial videotapes in this case in every way that matters.

Unable to distinguish *McDougal*, Plaintiffs and KQED instead ask the Court to depart from it. Plaintiffs attempt to conjure a conflict between *McDougal* and Ninth Circuit precedent by characterizing *McDougal* as holding that "derivative materials" are not the type of document that "the public has traditionally accessed" and then pointing to this Court's reluctance to expand the category of documents "traditionally kept secret." Plaintiffs' Br. 19–21. But *McDougal* did not decline to apply the common-law right of access because the materials in question were of a kind "traditionally kept secret." *Id.* at 19. It held that the common-law right did not apply *because they were derivative*. *McDougal*, 103 F.3d at 657. KQED tries a slightly different argument, contending that *McDougal* was based on the Eighth Circuit's rejection of "the strong presumption in favor of [public] access" applied by the Ninth Circuit, KQED's Br. 13 (quotation marks omitted). But as explained in our opening brief, that supposed distinction does not work either, since the *McDougal* court's rejection of a strong presumption of access was part of its *alternative* holding that disclosure was not necessary *even if the right of access attaches*. 103 F.3d at 657 ("Even if we were to assume that the videotape is a judicial record subject to the common law right of public access, . . ."). We have cited *McDougal* only for its separate, earlier holding that the right of access *does not apply to begin with*.

B. Local Rule 79-5 Also Does Not Require the Unsealing of the Video Recordings.

This Court's Rule 79-5 no more requires disclosure and dissemination of the trial recordings than the common law. Once again, that is so for multiple independent reasons.

1. Plaintiffs attempt to bar us, at the threshold, from even *offering* those multiple reasons, arguing that Proponents are "judicially bound" by counsel's statement in the brief exchange during the Ninth Circuit argument discussed above, which Plaintiffs characterize as an "oral judicial admission" that Rule 79-5's ten-year unsealing default-rule applies to the video recordings. Plaintiffs' Br. 11. For the reasons discussed above, there is nothing to this. The strict standards that govern judicial admissions are plainly not met here, *see supra*, pp. 4–5, and nothing in the two tentative sentences uttered by counsel at argument eight years ago forecloses Proponents, or this Court, from

now adopting whatever they determine to be the best interpretation of Rule 79-5. *See also New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24 (4th Cir. 1963) ("The doctrine of judicial admissions has never been applied to counsel's statement of his conception of the legal theory of the case. When counsel speaks of legal principles, as he conceives them and which he thinks applicable, he makes no judicial admission and sets up no estoppel which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the Court understands them.").

Nor is this Court bound to adhere to an incorrect interpretation or the Rule by "law of the case" principles. As also noted above, Plaintiffs' suggestion that the Ninth Circuit "confirm[ed] the presumptive application of Rule 79-5(g)'s ten-year rule" is completely implausible. Plaintiff's Br. 11. *Perry*'s only reference to Rule 79-5 was in *a single footnote*—which it introduced by noting that the recordings could not be broadcast "*at least* in the foreseeable future." 667 F.3d at 1084–85 (emphasis added); *see supra*, p. 4. And this Court's 2018 Order does not foreclose further consideration of the matter either. As the Ninth Circuit has held, "the law of the case doctrine is wholly inapposite" where a trial court is asked "to reconsider its own interlocutory order," since "*[a]ll [such] rulings of a trial court are subject to revision at any time*." *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001); *see also* FED. R. CIV. P. 54(b) (interlocutory orders "may be revised at any time before the entry of [final] judgment"); Mem. Order, *Perry v. Schwarzenegger*, No. 18-15292 (Apr. 19, 2019), ECF No. 57-1 (holding the Court's August 12, 2020 Order is not a final decision).

2. As explained in our opening brief, Rule 79-5(g) does not apply to the videotapes here, as an initial matter, because they were placed in the record *by the Court*, not filed by one of the parties. It is clear that Rule 79-5 is limited to party-filed documents from: (a) the title of the Rule, which indicates that it is meant to instruct parties on the procedures for "Filing Documents Under Seal"; (b) subsection a of the Rule, which establishes the scope of the Rule as governing "sealed documents submitted by registered e-filers" or "by a party that is not permitted to e-file"; and (c) the text of subsection g itself, which provides that the seal on a document shall not be lifted if the "Submitting Party"—i.e., the *party that filed the document*—shows "good cause" for maintaining the seal. *Accord* N.D. CAL. L.R. 79-5(f) (2010). KQED argues that Rule 79-5(g) does apply to documents lodged in

the record by a court, notwithstanding these textual cues, citing non-precedential orders sealing a variety of documents such as transcripts, trial exhibits, and judicial opinions. Of course, no one questions the authority of a court to issue opinions under seal, but none of KQED's cases holds that this authority comes from Rule 79-5—or that it is governed by Rule 79-5(g)'s presumptive ten-year limit. *See generally United States v. Shryock*, 342 F.3d 948, 983 (9th Cir. 2003) ("the district court has the inherent power to seal documents"). And none of KQED's cases involved *anything like* the item at issue here—a video recording of an entire trial, created at the direction of the Court for limited use in chambers in preparing findings of fact, and placed in the record by the Court itself.

KQED's backup argument that Rule 79-5(g)'s use of the term "party" "includes the Court" requires little response. KQED's Br. 11. KQED submits that (1) the term "designating party" in Rule 79-5 is the same as the term "designating party" in Northern District's Stipulated Protective Order; (2) that the Stipulated Protective Order defines "designating party" to include "a Party or Non-Party"; and (3) that the Protective Order further defines "Non-Party" to include entities "not named as a Party to this action." *Id.* But what KQED is *not* able to find, in its lengthy concatenation of various extraneous provisions, is *any* use of the term "Party" in the Rules to *include the Court itself*.

3. Even if Rule 79-5 *could* be read as applying to the sealing of documents submitted by the Court itself, rather than a "party" as the Rule says, it would still not require the unsealing of *these particular* recordings, because the dissemination and broadcast of a video recording of trial proceedings is governed by an altogether different rule—Rule 77-3—and that remains the case even if the recordings happen to be lodged in the record. KQED and Plaintiffs both respond by maintaining that Rule 77-3 has nothing to say about how a video-recording may be used after it is created, KQED's Br. 11–13; Plaintiffs' Br. 15, but we have already explained why that reasoning fails. *See supra*, pp. 8–9. In determining whether the video recording of the trial proceedings in this matter may be disclosed and broadcast to the public, this Court should follow the rule *that actually speaks to whether a video recording or trial proceedings may be disclosed and broadcast to the public*. *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1158 (9th Cir. 2004) (specific governs the general).

4. Even setting all these arguments aside, Rule 79-5 does not authorize the disclosure of the videotapes for still another reason: that Rule itself provides that the seal may be extended beyond the

ten-year default "upon a showing [of] good cause," N.D. CAL. L.R. 79-5(g), and that standard is plainly met here. For the reasons discussed in Part I, the critically important value of preserving the integrity of the judicial system constitutes a "compelling reason" to maintain the recordings under seal, as Judge Walker promised, even under the common-law or the First Amendment. It follows *a fortiori* that this compelling interest constitutes "good cause" for purposes of Rule 79-5(g).

Plaintiffs resist this conclusion, arguing that "[a]lthough Rule 79-5(g) uses the phrase 'good cause,' " it actually means "compelling reason" instead. Plaintiffs' Br. 12–13. The cases they cite show nothing of the kind. Rather, those cases—which distinguish between the standards that apply to the disclosure of sealed documents that are or are not attached to a non-dispositive motion—all deal with the *common law right of access*, not Rule 79-5. *See Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002) (creating exception to "the usual presumption of the *public's right of access*" for materials attached to non-dispositive motions (emphasis added)); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36, 1139 (9th Cir. 2003) ("In *Phillips*, . . . we carved out an exception to the presumption of access"); *Plexxikon Inc. v. Novartis Pharm. Corp.*, 2020 WL 1233881, at *1 (N.D. Cal. Mar. 13, 2020) (the " 'compelling reasons' standard" "derives from the common law"). We freely acknowledge that the common law (if it applied here, which it does not) could be overcome only by "compelling reasons." But that does not change the fact that *Rule 79-5(g)* on its face allows a seal to be extended "upon showing good cause." Ultimately the point is irrelevant, however, since the value of judicial integrity surmounts either threshold.

5. Finally, even if Rule 79-5 covered items filed by the Court itself, applied here contrary to Rule 77-3's more specific prohibition, and required the disclosure of the videotapes notwithstanding the compelling reasons for keeping them under seal, this Court's prior order *still* erred in calculating *the date* that disclosure should take place. Rule 79-5(g) sets forth a precise, formal rule governing how to calculate its timespan: the seal is presumptively lifted "10 years from the date the case is closed." In this case, there is no difficulty in figuring out when the clock started: it started on August 27, 2012, when the Court entered judgment and directed the Clerk to "close this file" and the case was marked closed. Dkt. #842. Both Plaintiffs and KQED point to the Court's Order two days later deeming its August 27 closure to be effective " 'nunc pro tunc' on August 12, 2010." KQED's Br.

14; *see also* Plaintiffs' Br. 18. But Rule 79-5 does not run from when the Court enters an order closing the case "nunc pro tunc"; it runs from when the case *was actually closed*. Proponents do not doubt the Court's power to correct clerical errors "nunc pro tunc" in some instances, but that authority "as a general rule does not enable the court to make 'substantive changes affecting parties' rights.' " *Singh v. Mukasey*, 533 F.3d 1103, 1110 (9th Cir. 2008) (quoting *Transamerica Ins. Co. v. South*, 975 F.2d 321, 325 (7th Cir. 1992)). Ultimately, Plaintiffs' nonsensical contention that this case "was actually closed on August 12, 2010, and has been since this Court's order on August 29, 2012" refutes itself, without the need of any assistance from us. Plaintiffs' Br. 18.[1]

C. There Is No First Amendment Right To Access the Video Recordings.

Finally, Plaintiffs and KQED ask the Court to issue a groundbreaking constitutional ruling holding that they are entitled to obtain the trial recordings under the First Amendment. The Court should decline the invitation. It is true that "[t]he First Amendment guarantees free and open access to judicial proceedings," Plaintiffs' Br. 22; *see also* KQED's Br. 21, but as the Ninth Circuit has squarely held, that First Amendment right is "amply satisfied" where the public and press are "granted access to the proceedings themselves." *Valley Broad. Co. v. U.S. Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1292–93 (9th Cir. 1986). There is no dispute that such access was granted here. Plaintiffs and KQED note that the First Amendment right extends to court "documents" and "records" as well as the proceedings themselves, Plaintiffs' Br. 22; KQED's Br. 21, but again, under settled law the First Amendment right to access these items *is fully satisfied* so long as the press and public are "provided with transcripts" of those materials. *Valley Broadcasting*, 798 F.2d at 1292; *see also Nixon*, 435 U.S. at 609 (First Amendment "simply is not applicable" where "the press . . . was permitted to listen to the tapes and report on what was heard" and "also were furnished transcripts of the tapes"); *United States v. Antar*, 38 F.3d 1348, 1359–60 (3d Cir. 1994); *United States v. Beckham*, 789 F.2d 401, 408–09 (6th Cir. 1986). Again, there is no dispute that such transcripts have been provided here.

[1] KQED objects that the validity of the *nunc pro tunc* Order is "moot" because "Proponents never challenged Judge Ware's judgement and amended order closing the case," KQED's Br. 14, but that misses the point. We do not object to the August 29, 2012 *nunc pro tunc* Order itself, which may be valid for certain purposes not at issue here; what we object to is any attempt to use that Order in calculating the 10-year period established by Rule 79-7(g)—and we *have* challenged *that*, at every opportunity.

Nothing in the Ninth Circuit's recent decision in *Courthouse News Service v. Planet* changes the analysis. 947 F.3d 581 (9th Cir. 2020). As KQED and Plaintiffs note, in *Courthouse News Service*, the Ninth Circuit held that in addition to applying to criminal proceedings, "a qualified First Amendment right of access extends to timely access to newly filed civil complaints." *Id.* at 591. But *Courthouse News Service* nowhere suggests that the right to access civil judicial records and proceedings is *more robust* than in the criminal context; and as just discussed, it is well established even in criminal cases that (1) the First Amendment is fully satisfied where the proceedings were open to the public and transcriptions of any records are freely available; and (2) there is no right, beyond this, to broadcast the trial proceedings—either contemporaneously or after the fact. *See Estes v. Texas*, 381 U.S. 532, 539 (1965); *id*. at 584–85 (Warren, C.J., concurring); *id*. at 588 (Harlan, J., concurring); *Amsler v. United States*, 381 F.2d 37, 53 (9th Cir. 1967); *see also Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988); *United States v. Kerley*, 753 F.2d 617, 620 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir. 1983).

Despite the lengthy perorations by Plaintiffs and their Amici about the First Amendment values that "prohibit government from summarily closing courtroom doors," Plaintiffs' Br. 22; *see also* Reporters' Amicus 7, they elsewhere *acknowledge* that "[t]he trial in this matter was a public proceeding," that "at no point in time was the courtroom closed," and that "[t]he testimony has been widely circulated" in transcript form. Plaintiffs' Br. 4, 5; *see also* KQED's Br. 15 ("Every moment of what was recorded was open to the public, and every line uttered by a participant was captured in the transcript."). The First Amendment guarantees nothing beyond this.

CONCLUSION

For the foregoing reasons, this Court should permanently maintain the seal.

Dated: May 27, 2020

COOPER AND KIRK, PLLC
ATTORNEYS FOR DEFENDANTS-INTERVENORS

By: /s/Charles J. Cooper
Charles J. Cooper

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 27, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 27, 2020

/s/ Theodore B. Olson
Theodore B. Olson